DOCKET

No. 08-969

Title: Hemi Group, LLC and Kai Gachupin, Petitioners
v.
City of New York, New York

Docketed: February 2, 2009
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-1665-cv, 06-1693-cv, 06-1694-cv, 06-1695-cv)
Decision Date: September 2, 2008
Rehearing Denied: October 30, 2008

Questions Presented

Date	Proceedings and Orders
Jan 27 2009	Petition for a writ of certiorari filed. (Response due March 4, 2009)
Feb 18 2009	Order extending time to file response to petition to and including April 3, 2009.
Apr 3 2009	Brief of respondent City of New York in opposition filed.
Apr 13 2009	Reply of petitioners Hemi Group, LLC and Kai Gachupin filed. (Distributed)
Apr 15 2009	DISTRIBUTED for Conference of May 1, 2009.
May 4 2009	Petition GRANTED.
Jun 5 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 17, 2009.
Jul 17 2009	Joint appendix filed.
Jul 17 2009	Brief of petitioners Hemi Group, LLC and Kai Gachupin filed.
Jul 21 2009	The time within which to file respondent's brief on the merits is extended to and including September 16, 2009.
Aug 17 2009	SET FOR ARGUMENT ON Tuesday, November 3 2009.
Aug 20 2009	CIRCULATED.
Sep 15 2009	Record received from U.S.C.A. for 2nd Circuit. (1 envelope) (This record contains 1cd.)
Sep 16 2009	Brief of respondent City of New York, New York filed. (Distributed)
Sep 23 2009	Motion for leave to file amicus brief filed by The Campaign for Tobacco-Free Kids. (Distributed)
Sep 23 2009	Brief amici curiae of Indiana, et al. filed. (Distributed)
Sep 29 2009	Application (09A318) of petitioners to file a reply brief on the merits in excess of the word limitation, submitted to Justice Ginsburg.
Oct 5 2009	Application (09A318) denied by Justice Ginsburg.
Oct 5 2009	Opposition of petitioners' to motion of amicus Campaign for Tobacco-Free Kids filed. (Distributed)
Oct 8 2009	Record received from U.S.D.C. for the Southern District of New York. (2 boxes). Portions of this record is electronic.
Oct 16 2009	Reply of petitioners Hemi Group, LLC and Kai Gachupin filed. (Distributed)
Oct 20 2009	Motion for leave to file amicus brief filed by The Campaign for Tobacco-Free Kids GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Oct 28 2009	Supplemental brief of petitioners Hemi Group, LLC and Kai Gachupin filed. (Distributed)
Nov 3 2009	Argued. For petitioners: Randolph H. Barnhouse, Los Ranchos de Albuquerque, N.M.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non commercial injury resulting from non payment of taxes by non litigant third parties.

STATEMENT OF PARTIES

The case in which petitioners are parties in the district court is *City of New York v. Nexicon*, 03 civ. 383 (S.D.N.Y. filed Jan. 17, 2003). It is one of four consolidated cases that were before the Second Circuit Court of Appeals and included in the opinion petitioners ask this Court to review. Although the caption of the Second Circuit Court's opinion includes the parties to the original four lawsuits in the federal district court, most of those parties have, during the course of litigation, been dismissed from the proceedings. As noted by the Second Circuit Court of Appeals,[1] on appeal to the Second Circuit, the only remaining defendants to each of the consolidated cases were:

1. *City of New York v. Nexicon, Inc., et al., No. 03 civ. 383 (S.D.N.Y. filed Jan. 17, 2003), appeal docketed, No. 06-1695-cv (2d Cir. Apr. 7, 2006).*

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Nexicon, Inc., formerly known as Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea, Hemi Group, LLC, and Kai Gachupin.

2. *City of New York v. Smokes-Spirits.com, Inc., et al.*, No. 04 civ. 6616 (S.D.N.Y. filed Aug. 16, 2004), *appeal docketed*, No. 06-1665-cv (2d Cir. Apr. 6, 2006).

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[1] *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 432 n. 3 (2d Cir. 2008) (App. A, 6a-7a).

Plaintiff-Appellant: City of New York.

Defendants-Appellees: Smokes-Spirits.com, Inc. and Michael Klee.

3. *City of New York v. A.E. Sales, LLC, Herring*, doing business as Nccigarettes.com, et al., No. 03 civ. 7715 (S.D.N.Y. filed Sept. 30, 2003), *appeal docketed*, No. 06-1693-cv (2d Cir. Apr. 7, 2006).

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Scott Herring, doing business as NCCigarettes.com, Jeff Reinhardt, Xfire Software LLC.

4. *City of New York v. ESmokes, Inc., Theresa Justice, doing business as eztobacco.com and Theresa Trivett, et al.*, No. 03 civ. 10091 (S.D.N.Y. filed Dec. 19, 2003), *appeal docketed*, No. 06-1694-cv (2d Cir. Apr. 7, 2006).

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Theresa Justice, doing business as Eztobacco.com and Theresa Trivett.

RULE 29.6 STATEMENT

Petitioner Hemi Group, LLC has no parent company, and no public company has any ownership interest in it.

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PETITION FOR A WRIT OF CERTIORARI

The Hemi Group, LLC and Kai Gachupin respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. A, 1a-69a) is reported at 541 F.3d 425. Petitioners' Motion for Rehearing En Banc was denied by the court of appeals on October 30, 2006 __ F.3d __ (App. D, 171a-172a). Petitioners' case below was one of four consolidated cases. The relevant U.S. District Court, Southern District of New York opinions are:

1. *City of New York v. Nexicon, Inc., (App. B, 70a-92a) which is unofficially reported at 2006 U.S. District LEXIS 10295 (S.D.N.Y. March 13, 2006); and*

2. *City of New York v. Cyco.net, Inc., (App. C, 93a-170a) which is reported at 383 F. Supp. 2d 526 (S.D.N.Y. 2005).*

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit sought to be reviewed was entered on September 2, 2008, and the order denying the motion for rehearing en banc was entered on October 30, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the order denying rehearing en banc. This Court has

jurisdiction to review the judgment of the U.S. Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The relevant statutory provisions, 18 U.S.C. §§ 1961, 1962 and 1964, are reproduced at Appendix E, 173a-180a.

STATEMENT OF THE CASE

I. Background Facts and Issues.

The Hemi Group, LLC, and Kai Gachupin are two of eleven defendants named by the City of New York ("City") in a second amended complaint raising federal RICO claims and certain state law causes of action. Three of the defendants were unrelated companies that sold cigarettes on the Internet. The remaining defendants, individual natural persons, did not sell cigarettes on the internet, nor did the City specifically allege that they had done so. In three separate contemporaneous actions, the City sued other defendants making similar allegations. The federal district court consolidated the four cases.

To support its RICO claim, the City alleged that each defendant participated in a scheme to defraud New York City of tax revenues by concealing from New York State tax administrators internet sales of cigarettes to New York City residents, primarily by an

alleged failure to file Jenkins Act reports with the State of New York.[2]

II. Decisions of the District Court.

Following the filing of the City's first amended complaint, the district court denied motions to dismiss based on improper venue and personal jurisdiction, granted motions to dismiss for failure to state a claim under New York's General Business Law § 349 and common law fraud, and granted the defendants' motions to dismiss for failure to state a RICO claim, with leave to file a second amended complaint. The City filed a second amended complaint, which the district court also dismissed upon motion of the defendants.

III. Decision of the Second Circuit Court of Appeals.

The City appealed both district court orders which together dismissed the City's complaints in their entirety. In a 2-1 decision, the Second Circuit Court panel (Judges Straub, Sotomayor, and Winter) vacated and remanded in part with respect to the RICO claims, affirmed the dismissal of the state common law fraud claim, and certified to the New York Court of Appeals the remaining state law claims. Judge Winter dissented as to the civil RICO claims, reasoning that under controlling Supreme Court precedent, the City lacked standing to sue under RICO. He concurred in the disposition of the state law claims. In its decision,

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[2] 15 U.S.C. § 375 et seq., Pub. L. No. 81-363, U.S. Code Congressional Service 894 (1949).

the Second Circuit Court of Appeals rejected an earlier Second Circuit Court of Appeals decision specifically holding that RICO's requirement of injury to business or property did not include non commercial losses to a subdivision of state government. The Second Circuit Court of Appeals denied petitioners' request to review the panel's decision en banc.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that there are two reasons why this Court should grant their petition for writ of certiorari and review the Second Circuit Court of Appeal's decision. First, as the Second Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to whether state and local governments can use RICO in federal district courts to collect taxes and similar non commercial losses. Second, the ruling by the Second Circuit Court of Appeal's conflicts with this Court's precedent requiring a party to suffer a direct injury to have RICO standing.

I. THE CIRCUITS ARE SPLIT.

Standing to bring a civil RICO claim is specifically limited to "[a]ny person injured in his business or property" 18 U.S.C. § 1964(c) (App. E, 179a-180a); *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985)("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property"); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008) (same), *cert. denied*, 129 S.Ct. 458 (2008). In determining whether this standing requirement is met, there is an acknowledged split among the Circuits on whether losses suffered by

government acting in its sovereign capacity are injuries to "business or property."

A. The Second Circuit (In the Present Case) and the Seventh Circuit Courts of Appeal Have Held That State Government and its Subdivisions Have RICO Standing to Recover Loss of Tax Revenue as "Injury to Business or Property."

In the Second Circuit decision that petitioners ask this Court to review, the court specifically held that "lost taxes can constitute injury to 'business or property' for purposes of RICO." *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 445 (2d Cir. 2008) (App. A at 34a). In doing so, the court expressly rejected the contrary proposition it had earlier adopted in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). *Id* at 445 (App. A at 33a-34a).

The Seventh Circuit Court of Appeals reached a similar result in *Illinois Dep't of Rev. v. Phillips*, 771 F.2d 312 (7th Cir. 1985) when it reversed a district court holding that, "RICO should not become a vehicle for federal jurisdiction and treble damages in states sales tax fraud cases." *Id.* at 316 (quoting district court holding reversed on appeal). In doing so, the Seventh Circuit Court of Appeals stated: "Although we have doubts about the application of RICO to the facts of this case we cannot say that it does not come within the framework of the statute." *Id.* at 317.

B. The Ninth Circuit and Sixth Circuit Courts of Appeal, and District Courts in the Third and Fourth Circuits, Have Held That State Government and its Subdivisions Do Not Have RICO Standing to Recover non Commercial Losses as "Injury to Business or Property."

1. The Circuit Courts of Appeal Decisions.

In *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 458 (2008), the court held that a county government did not have RICO standing to recover for injuries it allegedly sustained "in its sovereign and/or quasi-sovereign capacities, and may not claim the costs as damages to its property for purposes of civil RICO standing." 519 F.3d at 979. In so ruling, the Ninth Circuit Court of Appeals specifically relied on the Supreme Court decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Hawaii*, this Court ruled that the state of Hawaii lacked standing under the Clayton Act because the phrase "business or property" refers "to commercial interests or enterprises," and does not include loss of tax revenues. 405 U.S. at 264 ("When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act").

In the Sixth Circuit, the district court in *Michigan Dep't of Treasury v. Fawaz*, 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd*, 848 F.2d 194 (6th Cir. 1988) held that the state's treasury department was not a

"person" having standing to bring a civil RICO action against a state tax violator. In doing so, the court, "decline[d] to follow the Seventh Circuit's apprehensive holding" in *Illinois Dep't of Rev. v. Phillips. Michigan Dep't of Treasury*, 653 F. Supp. at 143. The court instead held that this Court's broad interpretation of RICO, "do[es] not stretch so far as to encompass a sovereign's attempt to prosecute its own citizens in a federal forum for state sales tax violations." 653 F. Supp. at 142-43. The Sixth Circuit Court of Appeals affirmed the district court in a decision not recommended for full text publication (1998 U.S. App LEXIS 6206 (6th Cir. Mich. May 19, 1988)). However, its reasoning confirms the split among the Circuits and therefore is included here. In its opinion, the Sixth Circuit Court of Appeals rejected the district court's holding that the State of Michigan is not a "person" under RICO. Nevertheless, the appeals court affirmed the district court's decision, noting that the state was "asking [the Court of Appeals] to designate the district courts as collection agencies for unpaid state taxes, presumably because [the state] can there pursue treble damages." *Id.* at page *6. The Sixth Circuit Court of Appeals also rejected the Seventh Circuit Court of Appeal's reasoning in *Illinois Dep't of Rev. v. Phillips*, referencing as had the district court the Seventh Circuit Court's "doubts" about the application of RICO in tax cases, and stating, "[b]ecause our 'doubts' have ripened into a conviction that RICO does not apply to the circumstances of this case, we are not persuaded to adopt the reasoning of that opinion." *Id.* at page *7.

2. District Court Decisions in the Third and Fourth Circuits.

In the Third Circuit, the district court in *Township of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452 (D. N.J. 2008), also quoting *Town of West Hartford v. Operation Rescue*, held that the Third Circuit's "concrete financial loss" requirement precluded a RICO claim by a governmental agency based on losses suffered when Township employees accepted bribes from the defendants. In doing so, the court concluded, "that Marlboro has failed to allege an injury to its business or property such that it may maintain a civil RICO cause of action under sections 1964(c)." 545 F. Supp. at 459.

In the Fourth Circuit, the district court in *West Virginia v. Moore*, 895 F. Supp. 864 (S.D. W.Va. 1995) dismissed the State of Virginia's RICO claim seeking to recover lost tax revenue. In doing so, the district court also rejected the Seventh Circuit Court of Appeal's reasoning in *Illinois Dep't of Rev. v. Phillips*, stating, "Even if it were determined that [the defendant] owed additional tax, the Court is not convinced that civil RICO is an appropriate method for the State to use in recouping that loss." 895 F. Supp. at 872.

C. Failure to Collect Taxes Is Not an Injury to "Business or Property."

The City's only claimed injury in this matter is alleged loss of tax revenues owed by non litigant third parties. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 432-33 (2d Cir. 2008) (App. A at 7a-8a)("Out-of-state cigarette sellers, however, are not

responsible for collecting or paying New York State and City sales taxes on cigarettes"). Thus, the City's complaint is that the Hemi Group and other defendants made it more difficult for the City to carry out one of the City's most basic functions – tax collection. The City's claim is not sufficient under RICO because loss of tax revenue owed by non litigant third parties is not "damage to business or property" under RICO. See *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 104 (2d Cir. 1990). In *Town of West Hartford*, the Second Circuit Court of Appeals held that where a municipality sues under RICO, it must allege injury to its business or property in its capacity as a party to a commercial transaction. The *Town of West Hartford* court went on to confirm that "allegations that a municipality is seeking to vindicate its interest in the 'general economy' or in its 'ability to carry out its functions' do not state a claim under RICO." *Id.* (citations omitted). Although the Second Circuit decision in *Town of West Hartford* repeatedly has been relied upon by other courts in rejecting RICO claims brought by state government and its subdivisions,[3] in the present case the Second Circuit panel elected to reject the Court's earlier holding in *Town of West Hartford* on this issue. 541 F.3d at 445 (App. A at 33a-34a).

Nevertheless, in the present case it is beyond dispute that the City of New York has not been injured in its capacity as a party to a commercial transaction. The City therefore has not, and cannot, allege any injury to its business or property necessary to support

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[3] See text at § I(B) above.

a RICO claim against the Hemi Group or Kai Gachupin.

II. THE SECOND CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

A. Supreme Court Precedent Limits RICO Standing To Directly Injured Parties.

Standing under RICO is determined by proximate causation, not actual "but for" causation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Proximate causation exists only where there is a direct relationship between the alleged injurious act and the claimed injury, indirect claims do not confer standing. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). This Court recently confirmed the direct injury requirement in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. ___, 128 S.Ct. 2131 (2008). Although the primary issue addressed by this Court in *Bridge* was first party reliance, this Court nevertheless reaffirmed the direct injury requirement it had enunciated in *Holmes* and *Anza* noting that the *Bridge* plaintiffs suffered direct, immediate injury, and were in fact the only parties directly injured. 128 S.Ct. at 2144.

In *Anza*, the defendant failed to charge New York sales tax to its customers and filed fraudulent tax returns with the New York State Department of Taxation and Finance, thereby undercutting its competitor, the plaintiff Ideal Steel. This Court held, however, that Ideal Steel lacked standing under RICO:

> The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result. ... (547 U.S. at 458) There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly. (547 U.S. at 460), When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. ... (547 U.S. at 461).

B. The City Is Not a Directly Injured Party.

Here, as in *Anza*, the only arguably direct victim was the state taxing authority. The majority decision attempts to distinguish *Anza* and its related cases by arguing variously that:

> "Although the State may also seek to sue to vindicate the law, the City should not have to rely on the State to enforce the RICO laws, where the City's injury in the form of lost taxes is no less direct than any comparable injury of the State." (541 F.3d at 443) (App. A at 30a); "[T]here are no speculative steps in this chain of causation. When defendants fail to comply with the Jenkins Act, defendants deprive both the City and the State of information needed to collect taxes from the inState and in-City cigarette purchasers" (541 F.3d at 443) (App. A at 30a); "[T]he predicate racketeering acts in this case are not Jenkins Act violations; rather, ... the predicate acts are wire and mail fraud

violations" (541 F.3d at 444) (App. A, at 31a-32a).

As Judge Winter's dissent insightfully observes, however, these attempted distinctions make no difference. After noting that, "[t]here is, moreover, a Supreme Court decision in print," (App. A., 66a) Judge Winter refers to that decision (*Anza v. Ideal Steel Supply Corp.*) stating:

> "Appellees owe no taxes to the City. The tax evasion is by the purchasers of the tobacco products. Even with the Jenkins Act, which requires reporting only to state authorities, appellees have no duty to disclose anything to the City." (App. A, 65a-66a)
>
> "If anything, however, the plaintiff in *Anza* had a stronger case with respect to proximate causation than the plaintiff here. In *Anza*, the defendant was the tax evader and had thereby lowered its costs and gained a competitive advantage over the plaintiff. In the present case, the City lost tax revenue because appellees sold cigarettes to purchasers, but did not report these sales to the State, as required by the Jenkins Act; because of this failure to report, the State was unable to pass on reports of such sales to the City even if it had been inclined to do so; without reports from the State, the City was unable to collect sales taxes from purchasers; concurrently, the purchasers individually opted not to fulfill their tax obligations to the City's taxing authorities. The City was at best an expectant gratuitous donee of information from the State, and the

> suggestion that the City's harm is somehow less attenuated than the plaintiff's in *Anza* seems to me unsustainable." (App. A, 66a-67a)

(541 F.3d at 460) (App. A at 65a-67a). Judge Winter went on to take issue with the majority's misapplication of this Court's decision in *Holmes v. Securities Investor Protection Corp.* Id. at 461.

As noted by Judge Winter, the majority decision conflicts with the directness requirement set out by this Court in *Anza* and *Holmes*. The City's claim is indirect because it depends on at least two intermediate contingencies: 1) State government deciding to exceed its constitutional authority and disseminate proprietary Jenkins Act information in ways that were never permitted by Congress; followed by 2) complete collection of taxes owed the City from third party non litigants.[4] The City's claims, which depend on these intermediate contingencies, are indirect. A locality cannot, by contracting with the State, make itself anything more than indirectly affected.

Moreover, there can be no mail and wire fraud "in the air;" both mail and wire fraud must be committed on some party. The only thing that makes the Petitioners' alleged actions arguably fraudulent is the nonfiling of Jenkins Act reports, which are owed, at

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[4] There are a number of good reasons for a State *not* to disseminate Jenkins Act reports (e.g., because it reads the Jenkins Act properly; because it respects Congress's exclusive authority over interstate commerce; because it respects the privacy of proprietary business records; or because it wants to avoid imposing undue burdens on interstate commerce).

most, to the *States* for collection of *State* taxes. 15 U.S.C. § 375, 376. Even if one assumes that the failure to file Jenkins Act reports constituted predicate acts of mail or wire fraud on the State, it does not constitute fraud on *localities*. The City has suffered no direct injury under RICO, and the Second Circuit Court of Appeals decision ruling otherwise improperly conflicts with the requirement for direct injury this Court set out in *Anza* and *Holmes*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

Nos. 06-1665-cv(L), 06-1693-cv(CON), 06-1694-cv(CON), 06-1695-cv(CON)

[Filed September 2, 2008]

City of New York,

Plaintiff-Appellant,

-v.-

Smokes-Spirits.Com, Inc., Michael Klee, www.smokincheap.com, C4LESS, LLC, John Does 1-100, Vincent Klee III, Jeff Marc LeBlanc, National Wholesale, LLC and Natalie Saalfeld,

Defendants-Appellees,

-and-

Joyce E. Houle, doing business as Indiancreektobacco.com, Kerry Varline, doing business as Keweenaw Bay Outfitters & Trading Post, Laurie Patterson, Cigarette Outlet, Inc., Walid

Enterprises, Inc., A.E. Sales LLC, Marilyn Samuelson, Allen Edmo, Tonna Edmo, Allen Smith, VJ Inc., A1 Enterprises, Inc., David Ray, doing business as Discount Cigarettes, Gerald A. Fow, doing business as Dannystobacco.com, Esmokes, Inc., ESM Holdings, Inc., PA Resources, Inc., doing business as Tobacco123.com, Wayne Stull, Paul Rainburd, doing business as Silver Cloud Smoke Shop, Terry Kilgore, Gary E. Kirschner and Scott Welker,

Defendants.

City of New York,

Plaintiff-Appellant,

-v.-

Scott Herring, doing business as Nccigarettes.com, Jeff Reinhardt, Xfire Software LLC and NCCigarettes.com,

Defendants-Appellees,

-and-

Joyce E. Houle, doing business as Indiancreektobacco.com, Kerry Varline, doing business as Keweenaw Bay Outfitters & Trading Post, Jerry Magnant, doing business as Keweenaw Bay Outfitters & Trading Post, Laurie Patterson, Cigarette Outlet, Inc., Walid

Enterprises, Inc., A.E. Sales LLC, Marilyn Samuelson, Allen Edmo, Tonna Edmo, Allen Smith, VJ Inc., A1 Enterprises, Inc., David Ray, doing business as Discount Cigarettes, Gerald A. Fow, doing business as Dannystobacco.com,

Defendants.

City of New York,

Plaintiff-Appellant,

-v.-

Theresa Justice, doing business as Eztobacco.com and Theresa Trivett,

Defendants-Appellees,

-and-

Esmokes, Inc., ESM Holdings, Inc., PA Resources, Inc., doing business as Tobacco123.com, Wayne Stull, Paul Rainburd, doing business as Silver Cloud Smoke Shop, Terry Kilgore, Gary E. Kirschner and Scott Welker,

Defendants.

City of New York,

Plaintiff-Appellant,

-v.-

Nexicon, Inc., f/k/a Cyco. Net, Inc., Richard A. Urrea, Fred Teutenberg, Brent Wolford, Daniel R. Urrea, Hemi Group, LLC., Brian Pereyra, D.C., Inc., Michael E. Smith d/b/a Paylesscigs, Domains for Sale, Hooray's Inc., Stephen F. Knopp, Burt Newman, Dmitriy Zilberman, S4L Distributing, Inc., William C. Baker III, Double B Distributing, d/b/a Discount Tobacco Store, Kai Gachupin, Dirtcheapcigs.com, Inc, and William J. Bevins,

Defendants-Appellees.

Before:

WINTER, STRAUB and SOTOMAYOR, *Circuit Judges*.

Plaintiff-Appellant City of New York ("City") appeals from judgments of the United States District Court for the Southern District of New York (Deborah A. Batts, *Judge*), dismissing the City's civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claims, and New York State law claims of common law fraud, violations of General Business Law ("GBL") § 349, and common law public nuisance for failure to state a claim. Because we hold that the City has standing to sue under RICO where it has alleged a direct injury of lost taxes inflicted on it by reason of defendant cigarette retailers' commission of mail and wire fraud through sale of cigarettes to New York City residents without complying with the Jenkins Act, and has, with certain exceptions, adequately alleged its RICO claims, we VACATE the District Court's

judgments and REMAND these cases for further proceedings; we AFFIRM the dismissal of the City's claim of common law fraud in all cases and the GBL § 349 claim in one of the consolidated cases; and we SEVER and retain jurisdiction over the GBL § 349 claims in two of the consolidated cases and all the public nuisance claims, and CERTIFY to the New York Court of Appeals a question regarding whether the City has standing to sue under GBL § 349 and a question regarding whether the City may assert a common law public nuisance claim that is predicated on N.Y. Public Health Law § 1399-ll.

Judge WINTER dissents in part and concurs in part in a separate opinion.

ELIZABETH S. NATRELLA, of counsel (Leonard Koerner, Eric Proshansky, *of counsel*; Michael A. Cardozo, Corporation Counsel of the City of New York, *on the brief*) New York, NY, for Plaintiff-Appellant.

MICHAEL B. POWERS, Phillips Lytle, LLP, Buffalo, NY (Preston L. Zarlock, Michael S. Cerrone, William H. Baaki, Phillips Lytle, LLP, Buffalo, NY, *on the brief*; Rachel L. Mitchell, Gowanda, NY, *on the brief*), for Defendant-Appellant Smokes & Spirits, LLC.[1]

RANDOLPH H. BARNHOUSE, Luebben Johnson & Barnhouse LLP, Albuquerque, NM, for

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[1] Smokes & Spirits, LLC claims on appeal that it was improperly named as Smokes-Spirits.Com, Inc. in the pleadings and appeal papers. We will use the name in the pleadings to refer to Smokes & Spirits, LLC throughout.

Defendants-Appellants Hemi Group, LLC and Kai Gachupin.

DAVID K. HEASLEY, Silverbery Goldman & Bikoff LLP (Toby M.J. Butterfield, Cowan DeBaets, Abrahams & Sheppard LLP, New York, NY, *on the brief*; James L. Bikoff, Silverbery Goldman & Bikoff LLP, Washington DC, *of counsel*), for Defendants-Appellants Scott Herring, Teresa Trivett, and Nexicon, Inc., et al.[2]

STRAUB, *Circuit Judge*:

In these four consolidated cases, the Plaintiff-Appellant City of New York ("City") appeals from the judgments of the United States District Court for the Southern District of New York (Deborah A. Batts, *Judge*), dismissing its civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"); claims of common law fraud; claims under New York's consumer protection statute, as codified at § 349 of the New York General Business Law ("GBL § 349"); and claims of common law public nuisance.[3] We vacate and remand in part

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[2] Because Teresa Trivett's name is spelled Theresa Trivett in the pleadings, we will use Theresa Trivett to refer to her.

[3] The four consolidated cases are: *City of New York v. Smokes-Spirits.com, Inc., et al.* ("*Smokes-Spirits*"), No. 04 Civ. 6616 (S.D.N.Y filed Aug. 16, 2004), *appeal docketed*, No. 06-1665-cv (2d Cir. Apr. 6, 2006); *City of New York v. A.E. Sales, LLC, Herring, doing business as Nccigarettes.com, et al.* ("*NCCigarettes*"), No. 03 Civ. 7715 (S.D.N.Y. filed Sept. 30, 2003), *appeal docketed*, No. 06-1693-cv (2d Cir. Apr. 7, 2006); *City of New York v. Esmokes, Inc., Theresa Justice, doing business as eztobacco.com and Theresa Trivett, et al.*, ("*EZTobacco*"), No. 03

with respect to the RICO claims; affirm in part with respect to the state law claims; and sever and retain jurisdiction over other of the state law claims and certify two questions to the New York Court of Appeals.

FACTS AND PROCEDURAL HISTORY

This case concerns allegations that out-of-state cigarette retailers are liable for failing to report purchases by New York City residents to New York State. In our review, we take as true the facts as alleged in the complaints and as supplemented by the City's RICO Statements, submitted pursuant to the District Court's rules. *See McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992).

New York State imposes a tax on all cigarettes used or sold in the State. *See* N.Y. Tax Law §§ 471, 471-a. New York State law also authorizes the City of New York to impose its own tax on cigarettes. *See* N.Y. Unconsol. Law § 9436(1). Pursuant to this authority, the City imposes a tax on all cigarettes possessed in

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Civ. 10091 (S.D.N.Y. filed Dec. 19, 2003), *appeal docketed*, No. 06-1694-cv (2d Cir. Apr. 7, 2006); *City of New York v. Nexicon, Inc., et al. ("Nexicon")*, No. 03 Civ. 383 (S.D.N.Y. filed Jan. 17, 2003), *appeal docketed*, No. 06-1695-cv (2d Cir. Apr. 7, 2006).

On appeal, in *Smokes-Spirits*, Smokes-Spirits.com and Michael Klee are the only remaining defendants. In *NCCigarettes*, Scott Herring doing business as NCCigarettes.com, Jeff Reinhardt, and Xfire Software LLC are the only remaining defendants. In *EZTobacco*, Theresa Trivett doing business as EZTobacco.com is the only remaining defendant. In *Nexicon*, Nexicon, Inc. formerly known as Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea, Hemi Group, LLC, and Kai Gachupin are the only remaining defendants.

the City for sale or use.[4] *See* N.Y.C. Admin. Code § 11-1302. In-state, these taxes are collected through the sale of tax stamps to in-state vendors. *See* N.Y. Tax Law § 471. Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes.

Due to interstate taxing discrepancies, cigarettes can be sold for apparently lower prices outside New York State. In part to offset the loss of state taxes caused by the interstate taxing discrepancies, Congress, in 1949, enacted the Jenkins Act, 15 U.S.C. §§ 375-78, to require out-of-state cigarette sellers to file a report with the tobacco tax administrator of each state into which the seller ships cigarettes to non-distributors, identifying the name, address, and quantity of cigarettes purchased by the non-distributor state residents. 15 U.S.C. § 376; *see also* S. Rep. No. 84-1147 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2883, 2883-84 (explaining that the Jenkins Act "was enacted for three major reasons: (1) The large and increasing loss of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in interstate commerce to consumers; (2) The discrimination caused by this evasion against sellers of cigarettes in States

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[4] The City charges $1.50 per cigarette pack possessed for use in the City. The State also charged $1.50 per pack used in New York State. On April 11, 2008, the New York State legislature approved a $1.25 increase in the state cigarette tax, effective on June 3, 2008, making the total tax due on cigarettes used in New York the highest in the country. *See* New York State, Department of Health, Press Release, *State Cigarette Tax Increase of $1.25 Protects Public Health (April 11, 2008), http://www.health.state.ny.us/press/ (Click on Press Releases, 2008 Press Releases, April 11, 2008) (last visited September 2, 2008).*

having a higher tax than the tax of the seller States; and (3) The fact that this evasion was accomplished through the use of the United States mail." (quoting from the report of the Committee on Ways and Means)). As amended in 1955, the Jenkins Act also requires the seller of cigarettes in interstate commerce to register with the tobacco tax officials of states where she advertises or into which she ships cigarettes. 15 U.S.C. § 376(a).[5] The information provided by out-of-state cigarette sellers to state taxing authorities under the Jenkins Act provides states the information necessary to collect the payment of cigarette taxes directly from the purchasers.

As pled by the City, although the Jenkins Act requires out-of-state cigarette merchants to report only to *state* taxing authorities, New York State and New York City have entered into various agreements for

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[5] As amended, the Jenkins Act provides: "Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall—

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof." 15 U.S.C. § 376(a).

the administration and collection of cigarette taxes.[6] In light of the agreements, the City alleges that "with respect to the collection of cigarette taxes, New York City will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act reports."

The City thus alleges that defendants (1) advertise their cigarettes over the Internet to its residents, (2) ship the orders by common carrier or the United States Postal Service into New York City, and (3) do not comply with the Jenkins Act registration or reporting requirements. According to the allegations, defendants' failure to comply with the Jenkins Act is an essential part of their business model because the savings that customers obtain from buying the cigarettes online are almost entirely due to the fact

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[6] The latest such agreement, dated June 28, 2002, provides:

> It is agreed that Taxation [the New York State Department of Taxation and Finance] and Finance [the New York City Department of Finance] shall cooperate fully with each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes as follows:
>
> (1) Information obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements; . . .
>
> (3) All violations of Article 20 of the Tax Law or Chapter 13 of Title 11 of the [Administrative Code of the City of New York] and all facts or information tending to indicate any such violation.

that the New York State and City taxes are not being charged or paid. As alleged, all of the defendants fail to inform customers of the use tax obligations, and most of the defendants, to varying degrees, make false representations to customers concerning the tax.[7] Specifically, in *Smokes-Spirits* and *EZTobacco*, the City alleges that defendants instruct their employees to inform inquiring customers that defendants are prohibited from disseminating customer information to taxing authorities. In *Nexicon*, the City contends that defendants affirmatively advertise their cigarettes as "tax-free" and assure customers that sales would not be reported to the New York State tax authorities. The City also alleges that *Nexicon* defendants attempt to prevent the City from accessing their sales records in order to maintain their customers' trust.

The City claims that it has lost "tens[,] if not hundreds[,] of millions of dollars a year in cigarette excise tax revenue" due to the combination of defendants' withholding of sales information, failure to register as cigarette sellers, and the individual taxpayers' failure to voluntarily pay use taxes to the City.[8] As relief, the City seeks to: (1) recover from

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[7] The City's complaint in *NCCigarettes* alleges only that defendants fail to disclose the customers' tax obligations.

[8] In the City's RICO Statements, the City cites to a report from Prudential Financial Research to show that countrywide estimated losses to the states from Internet cigarette sales would reach $889.9 million in 2005. In addition, between September 2006 and September 2007, the City claims that it recovered $3,281,679 through various efforts. *See* New York City Department of Finance, Cigarette Tax Enforcement, http://www.nyc.gov/html/dof/html/services/services_fraud_cigarettes.shtml (last visited September 2, 2008).

defendants three times the amount of the tax revenue lost as a result of defendants' violations; (2) require defendants prospectively to comply with the Jenkins Act; (3) require defendants to inform their customers that taxes are owed on purchases from defendants' websites and to inform customers that defendants file Jenkins Act reports; and (4) pay attorneys' fees.

I. Allegations Specific to the RICO Claims

As explained further below, RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). The City alleges that defendants engage in such a "pattern of racketeering" by committing mail or wire fraud each time they use, or cause to be used, the mails or wires to effect a sale of cigarettes to New York City residents without complying with the Jenkins Act's reporting requirements to the State.[9]

The alleged RICO enterprises in the cases before us generally take one of two forms. Under the first, a defendant corporate entity is alleged to be a passive enterprise with its defendant officer(s) and/or director(s) acting as the RICO "person[s]" who conduct the affairs of the enterprise in violation of the statute.

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[9] The RICO statute defines a "pattern of racketeering activity" as "at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5). "Mail fraud and wire fraud are forms of 'racketeering activity' for purposes of RICO." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 454 (2006) (citing § 1961(1)(B)).

The second set is comprised of association-in-fact enterprises,[10] where the association consists of a defendant entity and a third party, and the RICO "person[s]" consist of the defendant entity and, in general, the officers and/or directors of the entities comprising the enterprise.[11] The City's case-specific enterprise allegations regarding the remaining defendants are as follows:

In *Smokes-Spirits*, the remaining alleged enterprise is defendant Smokes-Spirits.com, a passive vehicle, and the person associated with it is defendant Michael Klee, an officer or employee of Smokes-Spirits.com. In *EZTobacco*, the remaining alleged enterprise is EZ Tobacco Enterprise ("EZTobacco Enterprise"), consisting solely of Electronic Computer Consulting, LLC, and the persons associated with it are defendant Theresa Trivett, doing business as EZ-Tobacco.com, and others unknown.

Nexicon involves two different groups of remaining defendants, and, for each, the City alleges the two alternative enterprise forms outlined above. With respect to the first group of defendants, the primary

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[10] As discussed further below, a RICO enterprise based on an association-in-fact theory is "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981).

[11] The District Court and the parties refer to the alternative enterprise forms, respectively, as "Enterprise 1" and "Enterprise 2."

enterprise consists of defendant Nexicon, Inc. ("Nexicon"), and the persons associated with it are defendants Richard Urrea, President of Nexicon; defendant Daniel Urrea, Chief Financial Officer of Nexicon; non-party Brent Wolford, technical consultant to American Indian CigCo, LLC ("American Indian CigCo"), a New Mexico limited liability corporation; and non-party Chuck Arning, who allegedly participated in concealing Nexicon's cigarette sales from the City. Alternatively, the City alleges an association-in-fact enterprise consisting of Nexicon and American Indian CigCo. Since purchasing Nexicon's Internet cigarette business, American Indian CigCo owns or controls the websites previously controlled by Nexicon, and is alleged to have assisted Nexicon in concealing cigarette sales previously made by Nexicon to New York City residents. The City alleges that the two companies, Nexicon and American Indian CigCo, have entered into profit-sharing and employment agreements. The RICO persons associated with this alleged association-in-fact enterprise are Nexicon, Richard Urrea, Daniel Urrea, and Wolford, Arning, and non-party Paul Rainbird, owner of American Indian CigCo.

With respect to the second remaining group of defendants in *Nexicon*, the City alleges that defendant Hemi Group, LLC ("Hemi Group"), incorporated in New Mexico, is an enterprise and that the person associated with it is defendant Kai Gachupin, owner or officer of Hemi Group. The City also alleges an alternative association-in-fact enterprise consisting of Hemi Group and A1 Enterprises, Inc. ("A1 Enterprises"), a New Mexico corporation, which sells cigarettes over the Internet. According to the allegations, "A1 Enterprises works with the Hemi

Group to conceal from New York City cigarette sales made by Hemi Group to New York City residents." The persons alleged to be associated with the Hemi Group association-in-fact enterprise are Gachupin and Hemi Group.

In *NCCigarettes*, the remaining alleged primary enterprise is NCCigarettes.com, and the persons associated with it are defendant Scott Herring, defendant Xfire Software LLC ("Xfire"), an Internet service provider, and defendant Jeff Reinhardt, manager, Chief Executive Officer, and sole owner of Xfire. The City also appears to have alleged an alternative association-in-fact enterprise, consisting of Herring, Reinhardt, Xfire and NCCigarettes.com. The persons associated with this alleged enterprise are Herring, Reinhardt, and Xfire.[12]

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[12] As for the alternative enterprise apparently alleged in *NCCigarettes*, the City alleges that "Xfire provides essential services to NCCigarettes.com while having actual knowledge that NCCigarettes.com sells cigarettes to New York City residents and conceals the cigarette sales from the New York State tax authorities by refusing to file Jenkins Act reports documenting the sales." In addition, it is alleged that "[w]ithout the services supplied by Jeff Reinhardt and Xfire Software LLC, the NCCigarettes.com could not sell cigarettes to residents of New York City" and "Jeff Reinhardt and Xfire Software LLC have actual knowledge that the NCCigarettes.com is engaging in mail and wire fraud and that NCCigarettes.com is using Xfire Software LLC's facilities, equipment and services for the purpose of defrauding the City of tax revenue." The City also alleges that "Jeff Reinhardt and Xfire Software LLC have admitted that they intend to continue assisting the NCCigarettes.com in implementing its mail and wire fraud scheme because of the fees obtained by providing Internet services to NCCigarettes.com."

II. Allegations Specific to the City's State Law Claims

In addition to RICO claims, the City asserts diversity-based state law claims against defendants for: (1) common law fraud; (2) violations of GBL § 349, a consumer protection statute; and (3) common law public nuisance.

The City alleges common law fraud in each of the four cases. It claims that defendants have a statutory duty to provide Jenkins Act reports to the State and to designate all packages they ship into New York as containing cigarettes. In all four cases, the City alleges that defendants intentionally fail to provide the required notice when they ship cigarettes into the City in order to defraud the City of tax revenues. Additionally, in *Smokes-Spirits*, the City alleges that defendants "materially mislead customers by stating cigarette prices to customers that omit the amounts that customers will have to pay to New York City and New York State in taxes." In *Nexicon* and *EZTobacco*, the City's common law fraud claims also incorporate allegations that defendants' "statements that their cigarettes are 'tax-free' and/or that defendants are not required to file Jenkins Act reports are materially deceptive and misleading to New York City consumers."

The City alleges claims under GBL § 349 in *Nexicon*, *Smokes-Spirits*, and *EZTobacco*, essentially based on the same allegations as outlined for the fraud claims.

Finally, the City makes a public nuisance claim in *NCCigarettes* and *EZTobacco*. The public nuisance

claims are predicated on New York State's Public Health Law § 1399-ll, which, subject to certain exceptions, bans the shipment of cigarettes via a common carrier to New York State residents. As the City alleges, in enacting that statute, the legislature "declared the shipment of cigarettes sold via the Internet to residents of [New York] State to be a 'serious threat to public health, safety, and welfare, to the funding of health care, and to the economy of the state.'" *See* N.Y. Pub. Health Law § 1399-ll, ch. 262, § 1. Thus, it is alleged, defendants "contribute to a public nuisance, and unreasonably and substantially interfere with rights common to the general public" by shipping cigarettes sold over the Internet into New York City.

III. District Court's Dismissals

A. Disposition of the City's State Law Claims

In January and February 2005, the District Court dismissed all of the City's state law claims for substantially the same reasons in each case in which the claims were alleged. *See Nexicon*, No. 03 Civ. 383, 383 F. Supp. 2d 526 (S.D.N.Y. Jan. 27, 2005); *Smokes-Spirits*, No. 04 Civ. 6616 (S.D.N.Y. Feb. 8, 2005); *NCCigarettes*, No. 03 Civ. 7715, 2005 U.S. Dist. LEXIS 2794 (S.D.N.Y. Feb. 9, 2005); *EZTobacco*, No. 03 Civ. 10091, 2005 U.S. Dist. LEXIS 2202 (S.D.N.Y. Feb. 16, 2005).[13]

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[13] The District Court dismissed the claims in *Nexicon* first, and then dismissed the claims in the three related cases on collateral estoppel grounds.

The District Court dismissed the common law fraud claims on the grounds that the City had not alleged that *it* relied on any of the allegedly fraudulent statements or omissions, and that any third-party reliance—either on the part of the consumers or the State—was not sufficient to state a claim. *See Nexicon*, 383 F. Supp. 2d at 565.

The District Court dismissed the City's GBL § 349 claims on the ground that the failure to file Jenkins Act reports could not, as a matter of law, mislead consumers. *See id.* at 562-63. The District Court then found that the City had failed to allege a consumer injury or harm to the public interest even as to those defendants alleged by the City to have made material misrepresentations directed at consumers, in the form of statements that defendants' cigarettes are tax free or that defendants did not have to file Jenkins Act reports. The District Court dismissed the argument that lost tax revenues injure all citizens on the ground that such an injury was too indirect. *See id.* at 564.

The District Court also dismissed the public nuisance claims, finding that the number of cigarette sales over the Internet was "small . . . compared to brick and mortar sales" and that the City had not alleged a harm that "endangers[] the public at large." *NCCigarettes*, 2005 U.S. Dist. LEXIS 2794, at *9-10. The District Court found that it was "unclear" that the number of people who purchase cigarettes over the Internet "qualifies as a considerable number of people" and concluded that the City's allegation that "Internet sales of cigarettes were predicted to account for 5.9% of industry volume in 2005" did not "comport with the

required considerable number of persons." *Id.* at *7 (internal quotation marks omitted).[14]

B. Disposition of the City's RICO Claims

At the same time that it dismissed the state law claims in 2005, the District Court also dismissed the City's RICO claims, with leave to amend, for failure to plead "distinctness" in the enterprise allegations.[15] See Nexicon, 383 F. Supp. 2d at 551. In March 2006, after the City amended its complaints and RICO Statements, the District Court again dismissed the complaints, this time with prejudice, for failure to state a claim. *See Nexicon*, No. 03 Civ. 383, 2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. Mar. 15, 2006); *Smokes-Spirits*, No. 04 Civ. 6616, 2006 U.S. Dist. LEXIS 11954 (S.D.N.Y. Mar. 21, 2006); *NCCigarettes*, No. 03 Civ. 7715, 2006 U.S. Dist. LEXIS 11922 (S.D.N.Y. Mar. 22, 2006); *EZTobacco*, No. 03 Civ. 10091, 2006 U.S. Dist. LEXIS 11953 (S.D.N.Y. Mar. 22, 2006).[16]

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[14] In *EZTobacco*, the District Court adopted and incorporated the analysis from *NCCigarettes* regarding the public nuisance claim and dismissed it based on collateral estoppel.

[15] As explained further below, under the so-called "distinctness" requirement, to state a valid claim under RICO, a plaintiff must "allege . . . the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

[16] As with the decisions in 2005, the District Court dismissed the *Nexicon* case first, and then dismissed the remaining three related cases on collateral estoppel grounds.

The District Court held that while the structure of the alleged primary enterprises was legally viable, the alleged RICO persons (employees and/or officers of the businesses) did not have individual duties to file Jenkins Act reports, and thus could not have committed the alleged predicate racketeering acts. The court explained:

> [T]he language of the Jenkins Act prohibits "persons" from transferring cigarettes for profit in interstate commerce. The statute defines "person" as including: "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 15 U.S.C. § 375(1). Employing basic statutory construction analysis, it is clear that companies are the primary entities responsible for filing Jenkins Act reports. The catch-all phrase "as well as individuals" suggests a separate class of people who may be liable under the Jenkins Act, but does not by any means connote officers or directors of the business entities listed before the phrase. Accordingly, as only the Defendant companies are responsible for filing the reports, and only they can be accused of fraudulently concealing such reports by not filing them, only the Defendant companies may be considered as having committed predicate acts. Thus, only they may properly be considered "persons" under the definition of the Jenkins Act and under RICO. Given the unique facts of the instant case, where a company is statutorily required to perform a function that it fails to do, resulting in fraud . . . the "persons" for purposes of RICO cannot be the officers of the companies, but must be the companies themselves.

Nexicon, 2006 U.S. Dist. LEXIS 10295, at *25-26. Accordingly, with respect to the alleged primary enterprises, the District Court found that the City failed to state a claim. *Id.* at *26.

With respect to the alternatively pled association-in-fact enterprises, the District Court explained that, under well settled law, an enterprise cannot consist solely of employees associating with their corporate employer, and that the City apparently tried to circumvent this rule by "tacking on" other companies with which each corporate defendant associated. The problem with this approach, the court found, was that while the City had alleged technically legitimate enterprises, (1) the City had failed to sufficiently allege that the tacked-on members of the enterprise shared a "common purpose" with the defendant corporations,[17] (2) the City failed to allege a nexus between the RICO predicate acts and the association-in-fact enterprises; and (3) the City failed to "explain each participant's role in the alleged course of fraudulent conduct." *Nexicon*, 2006 U.S. Dist. LEXIS 10295, at *28-29. In sum, the District Court found that while the City alleged that defendants have relationships with the third-party companies, the City "has not shown how the various components of the enterprise engaged in a fraudulent course of conduct together." *Id.* at *30.

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[17] The purportedly "tacked-on" persons are American Indian CigCo for the Nexicon association-in-fact enterprise; A1 Enterprises for the Hemi Group association-in-fact enterprise; and Xfire and Reinhardt for the NCCigarettes association-in-fact enterprise, to the extent such enterprise was alleged.

DISCUSSION

"We review the district court's decision de novo, reading all well-pleaded allegations in the [City's] favor." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008).[18]

I. The City's Civil RICO Claims

Pursuant to § 1962(c), RICO's substantive provision, it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). Thus, in order to establish a RICO violation under § 1962(c), a plaintiff (or prosecutor) must allege and prove four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). These requirements apply whether the RICO claim is civil or criminal in nature.

In civil cases, however, RICO plaintiffs must also satisfy the requirements of 18 U.S.C. § 1964(c). Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" has the right to "recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c). Thus, under

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[18] The general allegations in the four complaints and RICO Statements are essentially identical. Thus, unless otherwise noted, we generally refer to the allegations in *Nexicon* in our discussion.

§ 1964(c), a civil RICO claimant must show: (1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's "business or property," and (3) that such injury was "by reason of" the substantive RICO violation. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 (2d Cir.), *cert. denied*, 540 U.S. 1012 (2003).

In this case, the District Court dismissed the City's RICO claims on the ground that the City failed adequately to plead a RICO enterprise. Defendants ask us to affirm that decision arguing that the City failed to (1) allege a RICO violation under § 1962, and, in the alternative, arguing that the City failed to (2) demonstrate the requisite injury to its "business or property," or (3) allege an injury that was "by reason of" the alleged RICO violations, thus failing to allege causation. *See* 18 U.S.C. § 1964(c). We address these issues in reverse order below.[19]

A. Causation

The Supreme Court has addressed civil RICO's causation requirements in three key cases. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-61 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-70 (1992); *Sedima*, 473 U.S. at 496-97. First, in *Sedima*, the Supreme Court explained that the damages from any injury caused under RICO must

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[19] We have described the three issues raised as elements of standing: "[t]o demonstrate standing [under RICO], a plaintiff must plead, at a minimum, '(1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation.'" *Lerner*, 318 F.3d at 120 (quoting *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001)).

"flow from the commission of the predicate acts." 473 U.S. at 497. Thus, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation." *Id.* at 496. As the Court explained, "the compensable injury necessarily is the harm caused by [alleged] predicate acts . . . , for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Id.* at 497.

Subsequently, in *Holmes*, the Court focused more particularly on § 1964(c)'s requirement that the claimed injury be "by reason of" a defendant's RICO violation. *See* 18 U.S.C. § 1964(c). While recognizing that this language could be read to allow a plaintiff to recover simply upon a showing that defendant's violation was the "but-for" cause of plaintiff's injury, the Court held that the language was not intended to be read so broadly. *Holmes*, 503 U.S. at 265-66 (noting the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover" under RICO). Specifically, the Court held that a plaintiff must be able to show that the violation was not only the "but-for" cause of the injury, but also the proximate cause, which "demand[s] for some direct relation between the injury asserted and injurious conduct alleged." *Id.* at 268. The *Holmes* Court noted the following three policy reasons for requiring proximate causation in the RICO context: (1) the factual difficulty of measuring indirect damages and distinguishing among distinct independent causal factors; (2) the complexity of apportioning damages among plaintiffs "to obviate the risk of multiple recoveries"; and (3) the fact that "the need to grapple with these problems is simply unjustified by the general interest in deterring

injurious conduct, since directly injured victims can generally be counted on to vindicate the law." *Id.* at 269. The Court then held that the injury in *Holmes* was too remote to allow recovery because it was contingent upon the harm to another.[20] *Id.* at 271-74.

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[20] Similarly, in *Lerner*, we held that plaintiffs did not state a claim under RICO because plaintiffs' allegations of causation—that defendant banks failed to report a fraudulent attorney's overdrafts to disciplinary authorities which would have caused the attorney to be suspended or disbarred and thereby led plaintiffs to discontinue their investments with him— were too attenuated to meet the requirements of proximate causation. 318 F.3d at 122-24.

In our analysis of the proximate cause requirement, we have also stated that a plaintiff must be within the class the statute sought to protect, or the "zone of interests," when analyzing standing under RICO. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 239 (2d Cir.) (analyzing whether the harms flowed from the alleged predicate acts and whether the laws against those predicate acts were intended to prevent those harms), *cert. denied*, 519 U.S. 816 (1996). However, we have since explained that the "zone of interests" standing analysis is merely a reformulation of our proximate cause analysis and not a separate and distinct standing requirement. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 284 & n.4 (2d Cir. 2006) (explaining that since *Abrahams* we "resolved to adhere to the 'proximate causation' terminology employed by the Supreme Court in *Holmes*"); *Baisch v. Gallina*, 346 F.3d 366, 373 (2d Cir. 2003) ("Statutory standing is included in our proximate cause analysis."); *Lerner*, 318 F.3d at 121 n.6 (noting that "the reasonably foreseeable victim of a RICO enterprise will often be, unsurprisingly, the type of victim the RICO statute seeks to protect"). Even if the zone of interests test is a separate test from the proximate cause test, the question would be whether the City is within the zone of interests of the mail and wire fraud statutes, not as our dissenting colleague suggests, within the zone of interests of the Jenkins Act.

Third, and most recently in *Anza*, 547 U.S. 451, the Supreme Court found no proximate cause where the plaintiff's injury was not derivative, as it was in *Holmes*, but was nevertheless too remote to allow recovery. In *Anza*, a merchant sued its competitor under RICO alleging that it was injured because the competitor failed to charge sales tax and submitted fraudulent tax returns and, thus, was able to undercut plaintiff's price. *Id.* at 453-56. In finding that the plaintiff had inadequately alleged proximate causation, the Court explained that "[t]he cause of [the plaintiff's] asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. The alleged RICO violation directly caused the State to be defrauded of taxes, not the plaintiff to lose money to its competitor. *Id.*

The principles outlined in these decisions, as applied to the City's allegations, support a finding that the City has standing. Comporting with *Sedima*, the City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations (the predicate acts of mail and wire fraud in furtherance of a scheme to defraud the City of taxes). *See Sedima*, 473 U.S. at 496. Any recoverable damages occurring by reason of a violation of § 1962(c) (a specific dollar amount for each pack of cigarettes sold without complying with the Jenkins Act) flow from the scheme to defraud the City of use taxes at the heart of the alleged predicate acts of mail and wire fraud. *See id.* at 497.

The City's claims are easily distinguishable from the ones found to be insufficient in *Holmes*, 503 U.S. at 271. Specifically, unlike in *Holmes* where the plaintiff's

injury was derivative, the City's alleged injury of lost tax revenue is directly caused by defendants' alleged schemes. That New York State may also have been injured by defendants' alleged schemes does not make the City's injury any less direct; the City is owed a certain amount of taxes independent of any amount owed to or collected by the State.

The fact that the failure to file Jenkins Act reports with the State leads directly to the City's alleged harm, namely loss of tax revenues, also distinguishes this case from *Anza*, where the injury was found to be too attenuated. *See Anza*, 547 U.S. at 459. Moreover, *Anza* is distinguishable from this case in two important, related, respects. First, *Anza* involved a RICO claim of a *competitor* complaining of another merchant's ability to offer lower prices, and the Court's holding sought to limit RICO standing in that type of case. *See id.* at 460. As the Court explained, "claims brought by economic competitors . . . if left unchecked, could blur the line between RICO and the antitrust laws." *Id.* Second, because competition claims may involve a host of market factors unrelated to the alleged RICO violation, following the causal chain and measuring damages involve evidentiary complexities beyond what a factfinder should be expected to reasonably or reliably parse through. The *Anza* Court, in describing "the speculative nature of the proceedings that would follow if [plaintiff] were permitted to maintain its claim," explained:

> A court considering the claim would need to begin by calculating the portion of [defendant's] price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of [plaintiff's] lost sales

> attributable to the relevant part of the price drop. The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.

Id. at 459-60; *see also id.* at 460 ("A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense."). Here, by contrast, the City's claim is not market based. While the City's case will not be free of evidentiary wrinkles, any potential wrinkles are nowhere near the type or degree involved in *Anza*. *See id.* at 460.

Our finding of proximate causation in this case also fully comports with the "underlying premises" of that causation requirement, which the Supreme Court outlined in *Holmes*, 503 U.S. at 269.[21] *See Anza*, 547 U.S. at 458. As set forth above, the first concern raised in *Holmes* is that indirect claims present the factual difficulty of measuring indirect damages and distinguishing among distinct independent causal factors. *See Holmes*, 503 U.S. at 269. Here, however, measuring the damages is as simple as counting the number of cigarette packs sold by defendants to New York City residents without complying with the Jenkins Act. Moreover, the fact that the cigarette

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[21] Contrary to our dissenting colleague's view, we do not hold that *Holmes* is distinguishable simply because the City's claims do not implicate the policy concerns *Holmes* highlighted. Rather, we hold that *Holmes* is distinguishable because the City's alleged injury is *direct*. The fact that the City's claims do not implicate the policy concerns highlighted by the *Holmes* court bolsters our finding that the City has alleged a direct injury.

purchasers may be partially to blame—either because they were not aware of their reporting duties or because, as part of the alleged RICO conspiracy, they were intentionally hiding the fact of their purchases—does not defeat proximate causation.[22] We have held that defendants remain liable where their actions were a substantial factor that caused the loss. *See Lerner*, 318 F.3d at 123 ("Central to the notion of proximate cause [under RICO] is the idea that a person is . . . liable . . . to those with respect to whom his acts were a substantial factor in the sequence of responsible causation, and whose injury was reasonably foreseeable or anticipated as a natural consequence." (internal quotation marks omitted)); *see also Williams v. Mohawk Indus.*, 465 F.3d 1277, 1288 n.5 (11th Cir. 2006) (noting that under RICO, "proximate cause is not . . . the same thing as a sole cause, and it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a substantial factor in the sequence of responsible causation" (internal quotation marks omitted)), *cert. denied*, 127 S. Ct. 1381 (2007).[23] A contrary rule would effectively require that a plaintiff's injury be caused by only one source, and, as this is often not the case, it would operate to insulate from

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[22] The possibility that some customers might have moved, making it difficult to collect taxes from them, is not a causal factor that defeats standing.

[23] Like the Eleventh Circuit in *Williams*, we do not read the Supreme Court's holding in *Anza* to disrupt the "substantial factor" doctrine. *See Williams*, 465 F.3d at 1288 n.5. So long as a defendant's acts played a substantial part in causing the alleged injury, those acts may be said to have "directly" caused the injury, as *Anza* requires.

liability defendants who scheme with others in violation of RICO. Here, defendants' actions are clearly alleged to be a substantial factor in the City's loss.

The second potential problem highlighted by *Holmes*—namely, the complexity of apportioning damages among plaintiffs "to obviate the risk of multiple recoveries," 503 U.S. at 269—is also not implicated here. Only the City can claim loss of the City's use taxes. To the extent that the State of New York is also aggrieved by defendants' actions, it would have separate damages because it charges separate taxes. *See* N.Y. Tax Law §§ 471, 471-a.

The third reason highlighted by *Holmes* for requiring a direct injury is the expectation that those directly injured will litigate their claims in order to vindicate the law. 503 U.S. at 269. Although the State may also seek to sue to vindicate the law, the City should not have to rely on the State to enforce the RICO laws, where the City's injury in the form of lost taxes is no less direct than any comparable injury of the State.

Finally, the City's claims are distinguishable from those our Court has found to be inadequate, in cases on which defendants rely. Specifically, as alleged, there are no speculative steps in this chain of causation. When defendants fail to comply with the Jenkins Act, defendants deprive both the City and the State of information needed to collect taxes from the inState and in-City cigarette purchasers. And the City has alleged that it "will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act

reports." *Cf. Lerner*, 318 F.3d at 124 ("Each of the assumptions upon which this theory [of causation] rests is inherently speculative."). In addition, the City's alleged injury is not derivative of the State's injury. *Cf. Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000). Though the City and State are injured by the same activity, the City's injury does not depend on the State being injured. *Cf. id.* at 239 (concluding that injuries alleged by labor union health and welfare trust funds against tobacco companies and public relations firms, based on deception about the dangers of smoking and resulting health care expenses by funds and plan participants, were derivative of injuries suffered by the plan participants and thus too remote to confer standing on the funds). And it is clear that the City is alleged to be the target of the scheme because a large part of, if not the driving force behind, defendants' business plans was to sell cigarettes in such a way as to allow consumers to evade New York City's taxes. *Cf. Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 239 (2d Cir.) (holding that plaintiff lacked standing under RICO because the plaintiff was not a "target" of the scheme, but rather was merely injured "by the fallout from the scheme's exposure"), *cert. denied*, 519 U.S. 816 (1996). The fact that the State may also have been targeted by defendants' schemes does not change the result. "No precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing"; indeed, "there is a broad class of plaintiffs under RICO." *See Baisch*, 346 F.3d at 375.

Contrary to our colleague's dissenting view, the predicate racketeering acts in this case are not Jenkins

Act violations; rather, as discussed in Section C *infra*, the predicate acts are wire and mail fraud violations. Thus, whether or not the injury is direct must be determined by looking at the nature and consequences of the alleged predicate acts of *mail and wire fraud*. In the City's allegations, the Jenkins Act violations form the basis of defendants' *scheme to defraud*, an essential element of the alleged predicate acts of mail and wire fraud, which targeted both the City and State in an effort to deprive both of the information needed to collect use taxes. The fact that defendants have no statutory duty to the City under the Jenkins Act does not make the City's alleged harm from the mail and wire fraud violations derivative, unforeseeable, or any less direct. As the dissent recognizes, the mail and wire fraud statutes extend to protect taxing authorities from fraud. *See, e.g., United States v. DeFiore*, 720 F.2d 757, 761-62 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984). Moreover, we do not share our dissenting colleague's concern that this case represents a "major expansion of mail fraud doctrine." For the reasons we have already explained, in this unique case, the City has alleged an injury in the form of lost taxes that is independent from, even if parallel to, any injury suffered by the State.[24] By recognizing

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[24] The Supreme Court recently clarified that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Bridge v. Phoenix Bond & Indem. Co.*, __ U.S. __, 128 S. Ct. 2131, 2145 (2008); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *cf. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222-23 (2d Cir. 2008) (decertifying a class under RICO, in part, because common questions did not predominate as to the required element of

the City's right to proceed in this case, we are neither extending the scope of the mail and wire fraud statutes, nor the scope of RICO, beyond their established reach.

B. Injury to "Business or Property"

As noted above, one of the requirements for a civil RICO claim is that plaintiff be injured in its "business or property." 18 U.S.C. § 1964(c). Defendants argue that the City's allegations of lost taxes do not allege an injury to the City's "business or property" because that injury was not one the City incurred as a party to a commercial transaction. This argument finds support in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990), where we suggested that a municipality must have sustained its injury as a party to a commercial transaction to have standing under RICO. However, we have since explained that our statements to that effect in *Town of West Hartford* were merely dicta. *See Att'y Gen. of Can. v. R.J.*

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reliance). However, the Supreme Court noted that "it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation," and that there may be situations where the "complete absence of reliance may prevent the plaintiff from establishing proximate cause." *Phoenix Bond & Indem. Co.*, 128 S. Ct. at 2144. Here, there is no question that the City has alleged third-party reliance on the part of the State by alleging that defendants' failure to comply with the Jenkins Act caused the State to be unable to collect taxes. Thus, as we find that the City has adequately alleged proximate cause and third-party reliance, we need not address the question of whether an allegation of proximate cause fails where there are absolutely no allegations of reliance.

Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 132 n.40 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

We see no reason to import an additional standing requirement on municipalities for RICO claims, and thus expressly reject our dicta to the contrary in *Town of West Hartford*. *See Sedima*, 473 U.S. at 495, 497-500 (noting that "RICO is to be read broadly," and overruling our Court's engrafting of a "racketeering injury" requirement which found no support in the statute or legislative history). We have consistently held that tax losses from unpaid taxes are "property" for purposes of the mail and wire fraud statutes. *See, e.g.*, *Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); *United States v. Porcelli*, 865 F.2d 1352, 1355 (2d Cir.) (affirming mail fraud and RICO convictions for fraudulent under-reporting of taxes to State), *cert. denied*, 493 U.S. 810 (1989); *DeFiore*, 720 F.2d at 761. Moreover, in *Anza*, the Supreme Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. Thus, we hold that lost taxes can constitute injury to "business or property" for purposes of RICO, and conclude that the City has adequately met this requirement notwithstanding that its injury did not arise from its participation in a commercial transaction. *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314-16 (7th Cir. 1985) (rejecting the notion that a State government unit suing under RICO is limited to competitive or commercial injuries); *but see Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 977-80 (9th Cir. 2008) (endorsing the dicta in *Town of West Hartford*).

C. Section 1962(c) Violation

As noted above, to state a claim for damages under § 1964(c) a plaintiff must first allege a substantive RICO violation under § 1962(c). *See Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). In turn, § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). We discuss the "racketeering activity" and "enterprise" elements of a substantive RICO violation as they relate to these cases in turn.

1. Racketeering Activity

"Mail fraud and wire fraud are forms of 'racketeering activity' for purposes of RICO." *Anza*, 547 U.S. at 454; *see also* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud). "To procure a conviction for mail fraud, the government must prove three elements: (1) a scheme to defraud victims of (2) money or property, through the (3) use of the mails." *United States v. Walker*, 191 F.3d 326, 334 (2d Cir. 1999), *cert. denied*, 529 U.S. 1080 (2000). Likewise, a defendant commits wire fraud where he "was one of the participants in a fraudulent scheme which was furthered by the use of interstate transmission facilities." *United States v. Corey*, 566 F.2d 429, 431 n.2 (2d Cir. 1977). "Allegations of mail [or wire] fraud must be made with the particularity required by Federal Rule of Civil Procedure 9(b)." *McLaughlin*, 962 F.2d at 191.

"To constitute a [mail or wire fraud] violation . . . it is not necessary to show that [defendants] actually mailed [or wired] . . . anything themselves; it is sufficient if they caused it to be done." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *accord McLaughlin*, 962 F.2d at 191 (mail fraud); *United States v. Whiting*, 308 F.2d 537, 540 (2d Cir. 1962) (wire fraud), *cert. denied*, 372 U.S. 909 (1963). Moreover, "[i]t is sufficient for the mailing [or transmission] to be incident to an essential part of the scheme, or a step in the plot." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (internal quotation marks omitted).

It is settled law in this Circuit that a Jenkins Act violation—assuming one occurred—may form the basis of a wire or mail fraud conviction. *See DeFiore*, 720 F.2d at 761-62 (upholding wire fraud conviction based on scheme to defraud New York of "substantial cigarette tax revenues").[25] Other circuits have also reached this conclusion. *See* United States v. Melvin, 544 F.2d 767, 773 (5th Cir. 1977) (same with respect to mail fraud); *United States v. Brewer*, 528 F.2d 492, 495 (4th Cir. 1975) (same).

Here, the City alleges that the named RICO persons directed the alleged enterprises to "conceal cigarette sales from state tax authorities by failing to file Jenkins Act reports or directed [them] to effect sales by means of misrepresentations" while using the mails or wires to effect a sale of cigarettes to New York

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[25] It is also settled that the Jenkins Act does not displace the mail and wire fraud statutes with respect to fraudulent schemes to deprive states of cigarette taxes. *See DeFiore*, 720 F.2d at 761-62.

City residents. The City further alleges that this amounts to a "scheme to defraud New York City" of its use taxes because defendants have deprived the City of the information it needs to charge and collect those taxes. We find that these allegations sufficiently allege a scheme or artifice to defraud that was furthered by the use of mail or wires. *See McLaughlin*, 962 F.2d at 191.

Even assuming *arguendo* that the District Court was correct to find that the individual defendants acting in their official capacities could not be liable under the *Jenkins Act* for their companies' failures to comply with the reporting laws, the individuals allegedly committed the predicate acts of mail and wire fraud by *directing* the companies to use the mails and wires to sell cigarettes and to violate the Jenkins Act. These allegations are sufficient to allege a pattern of racketeering activity for purposes of RICO. *See Pereira*, 347 U.S. at 8-9.

2. The Enterprise Requirement

As to the enterprise requirement, the Supreme Court has explained that a plaintiff must "allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62 (2001); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("[B]y virtue of the distinctness requirement, a corporate entity may not be both the RICO person and the RICO enterprise under section 1962(c)."). A "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18

U.S.C. § 1961(3). An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

A RICO enterprise based on an association-in-fact theory is "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). We look to the "hierarchy, organization a id activities" to determine whether an alleged association "functioned as a unit." *United States v. Coonan*, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (noting that "proof of various racketeering acts may be relied on to establish the existence" of an association-in-fact enterprise), *cert. denied*, 503 U.S. 941 (1992). "[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004) (internal quotation marks omitted).

In practice, the dual requirements of (1) distinctness and (2) the proof needed to demonstrate an association-in-fact, work in tandem to weed out claims dressed up as RICO violations but which are not in fact. Specifically, the distinctness doctrine requires a plaintiff to demonstrate that the RICO person is legally separate from the RICO enterprise, while the association-in-fact requirements

help ensure that distinctness is not achieved by simply tacking on entities to the enterprise which do not in fact operate as a "continuing unit" or share a "common purpose." *See Turkette*, 452 U.S. at 583; *Satinwood*, 385 F.3d at 174.

As explained earlier, the alleged enterprises in the cases before us generally take on one of two forms. In the first, a defendant corporate entity is alleged to be a passive enterprise with its defendant officers and/or directors acting as the RICO "person[s]." (hereafter, the "primary enterprises"). As laid out above, these alleged primary enterprises are as follows:

- An enterprise consisting of defendant Smokes-Spirits.com, with defendant Michael Klee as the alleged RICO person.

- An enterprise entitled EZTobacco Enterprise consisting of Electronic Computer Consulting, LLC, with defendant Theresa Trivett, doing business as EZ-Tobacco.com, as the alleged RICO person.

- An enterprise consisting of defendant Nexicon, with defendants Richard Urrea, Daniel Urrea, and certain non-defendant individuals as the alleged RICO persons.

- An enterprise consisting of defendant Hemi Group, with defendant Kai Gachupin as the alleged RICO person.

- An enterprise consisting of defendant NCCigarettes.com, with defendants XFire, Scott

Herring, and Jeff Reinhardt as the alleged RICO persons.[26]

The second set of enterprises are association-in-fact enterprises, where the association consists of a defendant entity and a third-party, and the RICO "person[s]" consist of the defendant entity and generally officers and/or directors of the entities comprising the enterprise. The remaining alleged association-in-fact enterprises in these cases are as follows:

- An enterprise consisting of defendant Nexicon and non-party American Indian CigCo, with defendants Nexicon, Richard Urrea, Daniel Urrea, and certain non-parties, at least one of which is an employee/officer of American Indian CigCo, as the RICO persons.

- An enterprise consisting of defendant Hemi Group and non-defendant A1 Enterprises, with defendants Hemi Group and Kai Gachupin as the RICO persons.[27]

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[26] This alleged enterprise is a slight variant of the other alleged primary enterprises because two of the alleged RICO persons—Reinhardt and Xfire—are not officers and/or directors of the passive enterprise, NCCigarettes. Herring, however, is the alleged principal of NCCigarettes.

[27] Although it is not obvious from the pleadings, the District Court understood the City to be alleging a third association-in-fact enterprise, consisting of NCCigarettes.com, Xfire, Herring, and Reinhardt, with Herring, Reinhardt, and Xfire as the RICO persons.

We address each set of enterprises below.

3. The Primary Enterprises

The City's allegations are sufficient to meet the distinctness requirement with respect to all of the primary enterprises. In *Cedric Kushner*, the Supreme Court explained that the RICO "person" and alleged "enterprise" must be only legally, and not necessarily actually, distinct. 533 U.S. at 163, 166 (determining that Don King, the alleged "person," was distinct from Don King Productions, the alleged RICO "enterprise," of which Don King was president and sole shareholder). The City has alleged with respect to the primary enterprises that the enterprise is an innocent corporation, with its own legal basis for existing, and the persons are employees or officers of the organization unlawfully directing the enterprise's racketeering activities. That is sufficient under the distinctness standards articulated in *Cedric Kushner*. We address below the additional, case-specific challenges made by certain defendants.

a. NCCigarettes

Defendants in *NCCigarettes* argue that NCCigarettes.com is a sole proprietorship run by Scott Herring, not an enterprise, and that the additional persons—Jeff Reinhardt and Xfire—committed no predicate acts under RICO and are not liable because Xfire was merely an Internet service provider that provided services to the alleged "enterprise."

NCCigarettes.com's claim that it is a sole proprietorship is unavailing at this stage in the pleadings. Though we have not previously spoken on

this, our sister circuits have allowed § 1962(c) claims to proceed when the enterprise is a sole proprietorship with a distinct and separate identity from that of the individual defendant who owns it. These circuits have held that a defendant is distinct from the sole proprietorship enterprise, unless the sole proprietor is "strictly a one-man show." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) ("The only important thing is that [the enterprise] be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual."); *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir.) (affirming RICO conviction where defendant's "sole proprietorship was a troupe, not a one-man show"), *cert. denied*, 479 U.S. 1017 (1986); *see also Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1. (espousing the approach to sole proprietorships announced in *McCullough*, but holding that the distinctness requirement was not met under the circumstances of the case). Under this approach, which we now join, we find that the City has adequately alleged distinctness as to the NCCigarettes.com primary enterprise because the City has alleged that Herring's sole proprietorship is not a one-man show.

However, we agree with defendants Xfire and Reinhardt that the allegations are insufficient to state a claim against them as RICO persons. As explained earlier, § 1962(c) makes it "unlawful for any person employed by or associated with an enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs . . . ." 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, the Supreme Court explained that "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's

affairs,' one must have some part in directing those affairs." 507 U.S. 170, 179 (1993); *see also id.* at 184 ("[I]t is clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity.").

Although this is a low hurdle to clear at the pleading stage, *see Satinwood*, 385 F.3d at 176, the City's allegations—most generously construed—simply do not clear it with respect to Xfire or Reinhardt.[28] These defendants are not alleged to have violated the Jenkins Act, and, unlike the named RICO person in the other primary enterprises, neither Xfire nor Reinhardt is alleged to have directed or caused the

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[28] The sum of the allegations concerning XFire and Reinhardt are as follows:

Jeff Reinhardt is the Manager, CEO and sole owner of Xfire Software LLC, which is a North Carolina limited liability company that provides Internet website hosting, website design, domain name registration and Internet support services. NCCigarettes.com operates through web servers, software, and services supplied by Jeff Reinhardt and Xfire Software LLC. Without the services supplied by Jeff Reinhardt and Xfire Software LLC, the NCCigarettes.com could not sell cigarettes to residents of the City.

Jeff Reinhardt and Xfire Software LLC have actual knowledge that the NCCigarettes.com is engaging in mail and wire fraud and that NCCigarettes.com is using Xfire Software LLC's facilities, equipment and services for the purpose of defrauding the City of tax revenue. Jeff Reinhardt and Xfire Software LLC each know that NCCigarettes.com sells cigarettes over the Internet to New York City residents and also know that NCCigarettes.com does not file Jenkins Act reports in connection with those sales.

enterprise to commit a Jenkins Act violation. Simply alleging that certain entities provide services which are helpful to an enterprise without any allegations that those entities exert any control over the enterprise does not sufficiently allege a claim under RICO against those entities. *See Reves*, 507 U.S. at 179; *see also, e.g., Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir. 1994); *Univ. of Md. at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539-40 (3d Cir. 1993).

b. *Nexicon*

Nexicon argues that the City erroneously named it as a defendant because Cyco.net, Inc. (Nevada) sold its Internet tobacco retail business, Cyco.net, Inc. (New Mexico), to American Indian CigCo in 2003. Cyco.net, Inc. (Nevada) then changed its name to Nexicon, which is a publicly traded company engaged in network security and billing management.[29] Moreover, Richard Urrea claims to have terminated a consultancy

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[29] Richard Urrea claims that Cyco.net ceased selling cigarettes into New York City prior to the entry into enforcement of New York Public Health Law § 1399-ll (Unlawful shipment or transport of cigarettes). The legislature passed the law in 2000, but a federal court enjoined it until 2003. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 219 (2d Cir. 2003) (holding that the statute did not violate the Commerce Clause and reversing a district court's order enjoining the law). As further discussed below, the law makes it illegal to ship cigarettes to any person in New York "who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer . . . ; (b) an export warehouse proprietor . . . or an operator of a customs bonded warehouse . . . ; or (c) a person who is an officer, employee or agent of the United States government . . . ." N.Y. Public Health Law § 1399-ll.

agreement with American Indian Cigco and ceased doing business with the company, and thus argues that Nexicon should not be held liable. Whatever the merits of these factual averments, we must accept the City's allegations as true at this stage, and dismissal is not warranted on these bases.

Nexicon defendants also argue that the City failed to "make a showing" that Nexicon exercised any control over American Indian CigCo's shipments of cigarettes. The City is not required to "make a showing" that Nexicon exercised any control over American Indian CigCo's shipments of cigarettes at this stage. As explained, to show the requisite level of management, the City must "allege that the defendants 'conduct[ed] or participate[d], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Satinwood*, 385 F.3d at 175-76 (quoting 18 U.S.C. § 1962(c)). By alleging that Nexicon and American Indian CigCo have entered profit sharing and employment agreements, the City has adequately pled that Nexicon has "some part in directing the enterprise's affairs." *Reves*, 507 U.S. at 179.

4. Association-In-Fact Enterprises

Defendants also argue that the District Court correctly dismissed the City's association-in-fact enterprise allegations in *Nexicon* and *NCCigarettes*. The District Court found that while the City alleged technically legitimate enterprises based on the association-in-fact theory, the City failed to (1) allege a configuration that has an "'ongoing organization, formal or informal,'" and that its "'various associates function as a continuing unit'"; (2) allege a nexus

between the RICO predicate acts and the association-in-fact enterprises; and (3) "explain each participant's role in the alleged course of fraudulent conduct." *Nexicon*, 2006 U.S. Dist. LEXIS 10295, at *28-29 (quoting *Turkette*, 452 U.S. at 583).[30]

a. Nexicon Association-In-Fact Enterprise

The District Court erred in holding that the City failed to adequately plead an enterprise with respect to the Nexicon association-in-fact enterprise. First, the City has sufficiently alleged a functioning unit by alleging that Nexicon and American Indian CigCo entered profit sharing and employment agreements and that they have "interlocking financial and management agreements." The City further alleged that American Indian CigCo transfers assets from Nexicon to American Indian CigCo in order to hide assets and that American Indian CigCo regularly transfers funds earned from illegal cigarette sales to Nexicon.

The "relatedness" requirement also was met with respect to this enterprise. *See United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) (per curiam) (citing *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir.), *cert denied*, 503 U.S. 950 (1992)); *see also Satinwood*, 385 F.3d at 174. In this regard, the City alleges that defendants' business plans depended on

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[30] As noted earlier, two distinct association-in-fact enterprises were alleged in *Nexicon*: the Nexicon association-in-fact enterprise and the Hemi Group association-in-fact enterprise. In *NCCigarettes*, the District Court dismissed the apparent allegation of an association-in-fact enterprise based on collateral estoppel. 2006 U.S. Dist. LEXIS 11922, at *3.

(1) concealing their customers' purchases from state tax authorities; (2) informing their customers that the purchases would be concealed; and (3) concealing purchasers' tax liability from the purchasers themselves. Thus, the relatedness requirement was met because the alleged acts of mail and wire fraud were more than merely related to the activities of the online cigarette sellers; they were essential to defendants' business.

Finally, the City also sufficiently alleges the roles that relevant defendants had in operating or managing the Nexicon association-in-fact enterprise. Defendants Nexicon, Richard Urrea and Daniel Urrea are clearly alleged to have participated in management by virtue of their roles in the organizations that make up the enterprise.[31] As the Nexicon association-in-fact enterprise is clearly alleged to be made up of several defendant persons who operated or managed the affairs of the enterprise, the dismissal of this claim must be vacated.

b. Hemi Group Association-In-Fact Enterprise

However, we affirm the District Court's finding that the City failed to sufficiently allege a functioning unit with respect to the Hemi Group association-in-fact enterprise. Although the City alleges that the Hemi Group association-in-fact

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[31] While there is insufficient information to support the allegations that Chuck Arning and Brent Wolford direct the affairs of the enterprise along with the other alleged "persons," Arning and Wolford are not defendants and are thus not subject to liability. *See Reves*, 507 U.S. at 184.

displays a "continuity of structure and personnel, and has a consensual decision-making structure," the City alleges no facts tending to support this stock allegation. The bare allegations that "A1 Enterprises works with the Hemi Group to conceal from New York City cigarette sales" and that Kai Gachupin "is believed" to be an officer or employee of A1 Enterprises, as well as an owner or shareholder of the Hemi Group, are insufficient to plead the type of continuity required for an association-in-fact enterprise.

c. NCCigarettes Association-In-Fact Enterprise

To the extent the City's complaint can be construed as alleging an association-in-fact enterprise consisting of NCCigarettes.com and the Internet service provider, Xfire, we agree with the District Court that the City has failed to meet its pleading burden. Perhaps because the City never intended to plead an association-in-fact with respect to this group of defendants, it has not provided "any solid information regarding the hierarchy, organization, and activities" of the alleged enterprise, "from which we could fairly conclude that its members functioned as a unit." *See Satinwood*, 385 F.3d at 174 (internal quotation marks omitted). Thus, to the extent that the City has indeed attempted to allege an association-in-fact enterprise with respect to this group of defendants, the District Court's dismissal of this claim is affirmed.

D. Leave to Replead

With respect to those claims where we have found the City's enterprise allegations insufficient, we do not

foreclose the possibility that amendment could cure the shortcomings. In 2006, when the complaints were finally dismissed, the City had not moved for leave to amend the complaints, and the District Court did not grant it *sua sponte*. "Rule 15(a) of the Federal Rules of Civil Procedure instructs courts that leave to amend should be freely given. Leave to amend need not be granted, however, where the proposed amendment would be futile." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 18 (2d Cir. 1997) (citations and internal quotation marks omitted). Thus, on remand to the District Court, the court may grant leave to amend if and as it deems appropriate.

II. The City's State Law Claims

A. Jurisdiction

As a preliminary matter to our discussion of the City's state law claims, we must determine whether we have jurisdiction over them. Defendants argue that we lack jurisdiction over the appeals from the District Court's orders dismissing the state law claims because the City's notices of appeal did not specifically indicate an appeal from those orders. However, for the reasons explained below, we agree with the City that its notices of appeal from the final judgments encompass all prior interlocutory orders, including the earlier dismissals of the state law claims.

Rule 3 of the Federal Rules of Appellate Procedure requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). Rule 4 sets forth the time limits for filing a notice of appeal. Fed. R. App. P. 4. Rules 3 and 4 are a single jurisdictional threshold and may not

be waived. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988); *New Phone Co. v. City of New York*, 498 F.3d 127, 131 (2d Cir. (per curiam). However, we have held that the requirements of the rules "should be liberally construed." *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 54-55 (2d Cir. 2004).

Unless the District Court directs entry of a final judgment, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action" is, by definition, interlocutory. Fed. R. Civ. P. 54(b); *see Sahu v. Union Carbide Corp.*, 475 F.3d 465, 467-68 (2d Cir. 2007) (per curiam) (finding no jurisdiction as grant of partial summary judgment was not final order under 28 U.S.C. § 1291, in part, because a separate claim remained unresolved); *Hanlin v. Mitchelson*, 794 F.2d 834, 838 (2d Cir. 1986) ("[A]n order disposing of only a portion of a case is ordinarily not appealable absent a Rule 54(b) certification.").

In 2005, the District Court dismissed all of the City's claims, with leave to replead the RICO claims only. These dismissals were interlocutory because they did not end the actions. The only case here where the District Court directed entry of a "judgment" in 2005 is *Smokes-Spirits*. That "judgment" stated as follows:

> [T]he Court . . . having rendered its Order granting defendants' motions to dismiss with leave to plaintiff to file a Second Amended Complaint within 45 days of the Order dated February 8, 2005, it is, ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated

> February 8, 2005, defendants' motions to dismiss are granted.

Clerk's Judgment, *Smokes-Spirits*, No. 04 Civ. 6616 (S.D.N.Y. April 8, 2005). In light of the District Court's grant of leave to replead, we do not view this "judgment" as a final judgment or a certification by the District Court pursuant to Fed. R. Civ. P. 54(b). Thus, it too was interlocutory.

As the decisions dismissing the state law claims were interlocutory, the notices of appeal specifying the final judgments incorporate those 2005 orders. We generally "interpret[] an appeal from a specific order disposing of the case as an appeal from the final judgment, which incorporates all previous interlocutory judgments in that case and permits their review on appeal." *Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir. 2002); *see also Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 192 (2d Cir. 1999) ("When a district court enters a final judgment in a case, interlocutory orders rendered in the case typically merge with the judgment for purposes of appellate review."); 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3949.4 at 72 (3d ed. 1999) ("[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders.").

Here, the City appealed from "each and every part" of the final judgment entered in each case. Thus, the earlier orders dismissing the state law claims, with leave to amend the RICO claims, merge into the final judgments. *See Phelps v. Kapnolas*, 123 F.3d 91, 93 (2d

Cir. 1997) (construing the notice of appeal to apply both to an earlier order dismissing the complaint as to five out of six defendants, as well as to the final judgment order dismissing case against final defendant). Moreover, the City's intent to appeal from the entire judgment can be reasonably inferred from the City's notices of appeal.

The cases defendants cite to the contrary, where we found certain District Court orders to be outside of the scope of the appeal, are distinguishable. In those cases, the notices of appeal generally specified certain aspects of an order or judgment, or particular orders, but not others, and intent to appeal from the *entire* final judgment could not be inferred. *See New Phone Co.*, 498 F.3d at 131 (finding no jurisdiction to review separate order enjoining plaintiffs from filing additional complaints without leave of court because "intent to appeal from it [could not] be inferred"); *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 185 n.2 (2d Cir. 1999) (finding no jurisdiction to consider separate denials of motion for leave to amend or for reconsideration "because the plaintiff's notice of appeal specifically state[d] that he [was] appealing only the district court's June 25, 1998 decision dismissing the complaint"); *Kowsh v. Bd. of Elections*, 99 F.3d 78, 80 (2d Cir. 1996) (per curiam) (finding no jurisdiction over parts of judgment other than discrete portion specifically mentioned); *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 256 (2d Cir. (finding no jurisdiction to review the district court's earlier decision to dismiss the plaintiff's Railway Labor Act challenge where notice of appeal referred solely to an order dismissing the claims under the Federal Employers' Liability Act, and noting "in passing" that the Railway Labor Act

challenge "appear[ed] to be meritless").[32] Accordingly, we have jurisdiction to review the dismissals of the City's state law claims.

B. Common Law Fraud: *Smokes-Spirits*, *EZTobacco*, *NCCigarettes*, and *Nexicon*

We affirm the District Court's dismissals of the City's common law fraud claims. *See Nexicon*, 383 F. Supp. 2d at 564-66. Defendants argue that the City has not and cannot allege reliance, that defendants made no affirmative misrepresentations, and that failing to file Jenkins Act reports does not give rise to a cause of action for the City, in part because defendants have no duty to file Jenkins Act reports with the City and no duty to provide tax advice to their purchasers.

The elements of fraud under New York law are: (1) a misrepresentation or a material omission of material fact which was false and known by defendant to be false, (2) made for the purpose of inducing the plaintiff to rely on it, and (3) justifiably relied upon by the

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[32] Defendants also rely on one unpublished summary order from 2003. Pursuant to Second Circuit Rule 32.1, rulings by summary order do not have precedential effect, and "[c]itation to summary orders filed prior to January 1, 2007, is not permitted in this . . . court" except in certain circumstances not relevant here. *See* Local Rules of the United States Court of Appeals for the Second Circuit § 32.1(b), (c)(2). Thus, *Phlo Corp. v. Stevens*, 62 F. App'x. 377, 380 (2d Cir. 2003) (unpublished), cited by defendants, is nonprecendential and was cited in violation of this rule. Nonetheless, we note that the case is distinguishable from the current cases as it involved a question clearly not present here of whether we had jurisdiction over postjudgment and post-notice of appeal contempt orders where no new notice of appeal was filed.

plaintiff, (4) who then suffered an injury as a result of such reliance. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 1373 (N.Y. 1996); *see also Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006). "[A] fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information." *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165, 307 A.D.2d 113, 119-20 (N.Y. App. Div. 1st Dep't 2003); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 181 (2d Cir. 2007).

In all four cases before us, the City failed to plead "reasonable reliance *on the part of the plaintiff*." *Crigger*, 443 F.3d at 234 (emphasis added). Rather, under the City's theory, the alleged intentional omissions or misrepresentations were either directed at the State or the consumers, causing the City to be unable to collect its taxes. Such allegations of third-party reliance, however, are insufficient to make out a common law fraud claim under New York law. *See Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) (explaining "that a plaintiff does not establish the reliance element of fraud for purposes of . . . New York law by showing only that a third party relied on a defendant's false statements").

The City's sole argument, located in part of a footnote of its brief, for why the common law fraud claims should nevertheless proceed, is that it has an agreement with the State to exchange information on cigarette sales transactions. However, allegations that the City has an agreement to exchange tax information with the State—which is the party that relied on the omission of information required under the Jenkins

Act—is simply another iteration of its thirdparty reliance claim. Therefore, we affirm the District Court's dismissals of the City's common law fraud claims in all four cases.

C. The City's GBL § 349 Claims: *Nexicon*, *Smokes-Spirits*, and *EZTobacco*

The District Court dismissed the City's GBL § 349 claims in the three cases where it was raised. For the reasons below, we affirm the district court's holding in the *Smokes-Spirits* case, and reserve judgment in the *Nexicon* and *EZTobacco* cases pending certification of a question regarding standing to the New York Court of Appeals.

GBL § 349(a) declares that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in" New York are unlawful. N.Y. Gen. Bus. § 349(a). The statute provides a private right of action. *Id.* at § 349(h); *see Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris U.S.A. Inc.*, 3 N.Y.3d 200, 205, 818 N.E.2d 1140, 1143 (N.Y. 2004). "To make out a prima facie case under Section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (per curiam) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 744 (N.Y. 1995)). "[A]n action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., but need only meet the bare-bones notice-pleading requirements of Rule 8(a) . . . ."

Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005).

We have explained that "the gravamen" of a GBL § 349 claim is "consumer injury or harm to the public interest." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (internal quotation marks omitted), *cert. denied*, 516 U.S. 1114 (1996). Thus, in *Securitron*, we found that a plaintiff could sue its *competitor* under GBL § 349 as it had alleged injury to the public interest. *See id.*[33]

The City's allegations in *Smokes-Spirits* are that defendants intentionally failed to inform their customers that they must pay taxes and omitted the amount of taxes owed to the City and the State from the advertised prices. *See Oswego*, 647 N.E.2d at 745 (holding that the definition of deceptive acts and practices under GBL § 349 includes "representations or omissions"). But the omission of the tax amount from the price of the cigarettes, where the vendor is not required to collect that tax, is not, on its own, likely to mislead or assume significance in the deliberation of a reasonable consumer acting

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[33] The *Securitron* decision was cited approvingly by the New York Court of Appeals when we certified to it the question of whether a third-party payer, such as an insurer, has standing to bring an action under GBL § 349. *See Blue Cross & Blue Shield of N.J.*, 818 N.E.2d at 1144; *see also Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris, U.S.A., Inc.*, 344 F.3d 211, 218 (2d Cir. 2003) (finding that insurer had satisfied the requirement of an injury to the public interest by alleging that defendants' "deceptive practices involved serious harm to the public" in that they "induced consumers to smoke and discouraged them from quitting smoking, thus significantly increasing their risk of illness and even death").

reasonably under the circumstances. *See id.* Consumer taxpayers are charged with some knowledge of the law. *See Niedringhaus v. Comm'r*, 99 T.C. 202, 222 (1992) ("As a general rule, taxpayers are charged with knowledge of the law."). In this unique situation, an omission of information about a consumer's duty to pay taxes to that consumer's home state and city cannot be tantamount to an affirmative misrepresentation that a consumer does not need to pay taxes. Therefore, we affirm the District Court's dismissal of the GBL § 349 claim in *Smokes-Spirits*.

We reach a different conclusion, however, with respect to allegations in *Nexicon* and *EZTobacco*, where the City alleges that defendants represented to customers that the cigarettes are "tax free," that their customers do not have to pay taxes, and/or that defendants did not have to file Jenkins Act reports. Such statements are untrue and could mislead a reasonable consumer into believing that those cigarettes are in fact tax free.[34] See Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 344, 725 N.E.2d 598, 604 (N.Y. 1999) (finding that plaintiffs

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[34] Despite the possibility that consumers might be using the websites in order to knowingly evade taxes, *see Nexicon*, 383 F. Supp. 2d at 563, the City alleges (and this allegation must be taken as true) that consumers were misled by the deceptive statements. GBL § 349 was meant to take into account the impact of allegedly deceptive statements on the "vast multitude which the statutes were enacted to safeguard—including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273, 372 N.E.2d 17, 19 (N.Y. 1977); *see also Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau*, 7 N.Y.3d 568, 575, 859 N.E.2d 473, 477 (N.Y. 2006) (Graffeo, J., dissenting).

adequately alleged a claim under GBL § 349 where they alleged "that defendants lured them into purchasing policies by using illustrations that created unrealistic expectations as to the prospects of premium disappearance upon a strategically chosen 'vanishing date'"). Though taxpayers are charged with general knowledge of the tax laws, they are not charged with knowing them to such an extent that we expect them to discern an actual and intentional misrepresentation about the intricate tax laws at issue in this case. Thus, a misrepresentation that affirmatively assures a consumer that no taxes are due may be reasonably relied on, whereas, as discussed above, the failure to list, in the price of a cigarette pack, the tax which the seller is not required to collect, may not.

A question nevertheless remains as to whether the City has standing to allege its GBL § 349 claims in *Nexicon* and *EZTobacco*. Although we have held that GBL § 349 extends to protect competitors as well as consumers, *see Securitron*, 65 F.3d at 264, we are aware of no case extending protection under GBL § 349 to an entity that was neither harmed as a competitor nor a consumer.

As a general matter, if the New York Court of Appeals has not ruled on an issue of state law, "we are bound to apply the law as interpreted by New York's intermediate appellate courts unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *Blue Cross & Blue Shield of N.J.*, 344 F.3d at 221 (internal quotation marks and alterations omitted). We may certify a question if "with respect to the question asked . . . there is a statute implicated [and] its plain language does not answer

the question." *Id.* (internal quotation marks omitted) (certifying the question of whether the claims of a "third party payer of health care costs seeking to recover costs of services provided to subscribers as a result of those subscribers being harmed by a defendant's or defendants' violation of [GBL] § 349 [are] too remote"); *see also Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 42 (2d Cir. 2000) (certifying the question of whether gun manufacturers owe a duty to exercise reasonable care in marketing and distributing their products in New York because the question of "[w]hether defendants owe a duty to the plaintiffs' victims is . . . a particularly thorny inquiry, implicating questions of policy that cannot adequately be resolved by reviewing New York state precedents").

Although the parties did not request certification, we are empowered to seek certification *sua sponte*. *See* Local Rules of the United States Court of Appeals for the Second Circuit § 0.27. With respect to the unsettled question of whether the City has standing under New York law to allege its GBL § 349 claims in *Nexicon* and *EZTobacco*, we believe that certification to the New York Court of Appeals is the most prudent path. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 407 (2d Cir. 2008) (Katzmann, J., dissenting) (noting that the use of certification for an unsettled area of state law is "[i]n keeping with our preference that states define the meaning of their own laws in the first instance"); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir. 2001) (same). We therefore sever the GBL § 349 claims in *Nexicon* and *EZTobacco*, and certify them to the New York Court of Appeals, as set forth below. *See Abrahams*, 79 F.3d at 239 (severing a claim and certifying it to the Connecticut Supreme Court).

D. Public Nuisance: *EZTobacco* and *NCCigarettes*

Under New York law, a public nuisance is "conduct or omissions which . . . endanger or injure the property, health, safety or comfort of a considerable number of persons, and is actionable by a governmental agency." *Hoover v. Durkee*, 622 N.Y.S.2d 348, 349, 212 A.D.2d 839, 840 (N.Y. App. Div. 3d Dep't 1995) (citation and internal quotation marks omitted). The City's public nuisance claims before us are predicated on New York Public Health Law § 1399-ll. In enacting that law, the legislature found "that the shipment of cigarettes sold via the Internet or by telephone or by mail order to residents of this state poses a serious threat to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state." N.Y. Pub. Health Law § 1399-ll, ch. 262, § 1.

While the legislature clearly believes that the internet sale of cigarettes into New York poses a health risk to its residents, we have some reservation as to whether the legislature, in passing § 1399-ll, intended to displace common law nuisance claims with respect to this subject matter. *Cf. City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp.2d 332, 350-51 (E.D.N.Y. 2008). A violation of § 1399-ll is a crime and the law empowers the State Commissioner of Health to impose a civil fine. *See id.* § 1399-ll(5). It does not, however, provide for enforcement by another entity besides the State. Because this question implicates both the State's particular interest in protecting the public's health, as well as the public policy goals behind the Public Health Law, we find that certification of this question is also the most

prudent path. *See Sealed v. Sealed*, 332 F.3d 51, 59 (2d Cir. 2003). We therefore also sever the public nuisance claims, and certify them to the New York Court of Appeals, as set forth here.

* * *

For the foregoing reasons, we respectfully certify to the New York Court of Appeals the following questions:

1. Does the City have standing to assert its claims under General Business Law § 349?

2. May the City assert a common law public nuisance claim that is predicated on N.Y. Public Health Law § 1399-ll?

In formulating these two questions as we have here, we do not mean to limit the Court of Appeals's response. The certified questions may be deemed expanded to cover any further pertinent question of New York law that the Court of Appeals finds appropriate to answer in connection with these issues. This panel retains jurisdiction over the GBL § 349 claims in *Nexicon* and *EZTobacco* and the public nuisance claims pending the New York Court of Appeals's disposition of the certified questions.

It is hereby ORDERED that the Clerk of this Court transmit to the Clerk of the New York Court of Appeals a Certificate, as set forth below, together with a complete set of briefs and appendices filed in this Court by the parties.

CERTIFICATE

The foregoing is hereby certified to the New York Court of Appeals, pursuant to 2d Cir. R. § 0.27 and N.Y. Comp. Codes. R. & Regs. tit. 22, 500.27, as ordered by the United States Court of Appeals for the Second Circuit.

CONCLUSION

We sever the GBL § 349 claims in *Nexicon* and *EZTobacco* and all the public nuisance claims and certify two questions regarding those claims to the New York Court of Appeals. We retain jurisdiction over those claims pending the New York Court of Appeals's disposition. Because we believe that the disposition of the certified questions will not affect the discovery needed as to the RICO claims and that delay in remanding those claims awaiting that disposition is therefore unnecessary, we VACATE and REMAND as to the City's primary RICO claims as well as the alternative association-in-fact enterprise claim alleged against Nexicon. *See Abrahams*, 79 F.3d at 240 (remanding claims after severing a separate claim and certifying it to the Connecticut Supreme Court, upon a finding that delay in remanding the reinstated claims was unnecessary). We AFFIRM the dismissal of the remaining RICO claims, the common law fraud claims in all cases, and the GBL § 349 claim in *Smokes-Spirits*. We have considered the parties' remaining arguments and find them to be without merit.

WINTER, Circuit Judge, dissenting in part and concurring in part:

Respectfully, I dissent in part and concur in part. In my view, the alleged RICO violation by appellees was not the proximate cause of the City's injuries, and therefore the City has no standing to bring the RICO action.[1] I concur in my colleagues' disposition of the state law claims, which are asserted on the basis of diversity jurisdiction and therefore must be addressed even if no valid federal claim is asserted.

Where a civil RICO claim is based on fraud, not all injuries suffered by "but-for" victims of the fraud are proximately caused by the fraud. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992). Only those injuries suffered by direct victims of the fraud are compensable. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006). In addition, we have held that, with regard to RICO claims based on violations of a statute as predicate acts, "the plaintiff must show both that he is within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent . . . . [T]he issue is . . . one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), [one] the statute sought to avoid." Abrahams v. Young & Rubicam, Inc., 79 F.3d 234, 237 (2d Cir. 1996).

Determining whether a "but-for" RICO victim may recover for injuries suffered from fraudulent acts requires an analysis of the nature of the alleged fraud.

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[1] This is not to say that I agree with my colleagues' analysis of other objections raised by appellees with regard to the RICO claim. I simply do not address them.

Here, the fraud is not garden variety. There has been no misrepresentation of a material fact or omission that renders a material statement misleading. See United States v. Autuori, 212 F.3d 105, 118 (2d Cir. 2000). Instead, the alleged fraud is based on violations of a statute, the Jenkins Act, and, therefore, the nature and consequences of the fraud are determined solely by the scope of that Act.

My colleagues and I may differ on the relevance of the Jenkins Act. They state, "Contrary to our colleague's dissenting view, the predicate racketeering acts in this case are not Jenkins Act violations; rather . . . they are wire and mail fraud violations." Maj. Op. at 25. However, my colleagues describe the complaint's allegations of mail and wire fraud as "us[ing] . . . the mails or wires to effect a sale of cigarettes to New York City residents without complying with the Jenkins Act's reporting requirements to the State." Maj. Op. at 9. They also state that "the failure to file Jenkins Act reports with the State leads directly to the City's alleged harm," Maj. Op. at 21, and that "measuring the damages is as simple as counting the [cigarettes sold] to New York City residents without complying with the Jenkins Act," Maj. Op. at 22. The only fraudulent acts alleged that sound in fraud, therefore, are the violations of the Jenkins Act.[2]

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[2] My colleagues also note that the fact that the statutory reporting duty is owed to the State rather than the City does not render the "harm [to the City] from the mail and wire fraud violations . . . any less direct [because] [a]s the dissent recognizes, the mail and wire fraud statutes extend to protect taxing authorities from fraud." Maj. Op. at 25 (citing United States v. DeFiore, 720 F.2d 757, 761-62 (2d Cir. 1983)). This description of both the reach of the mail and wire fraud statutes and of this dissent are rather

Taking my colleagues' own descriptions of the alleged fraud at face value, I look to the Jenkins Act to determine the nature and consequences of the fraud. The Act is a regulatory provision directing mandatory disclosure of certain facts in order to facilitate tax collection by state taxing authorities. The Act requires those who sell tobacco products to purchasers in other states to report those sales and the identity of the purchasers to the state taxing authorities in the respective states. 15 U.S.C. § 376. The goal is solely to render evasion of state tobacco taxes by purchasers in the respective states more difficult. S. Rep. No. 84-1147 (1955), reprinted in 1955 U.S.C.C.A.N. 2883, 2883-84; S. Rep. No. 81-644 (1949), reprinted in 1949 U.S.C.C.A.N. 2158, 2158-60.

Absent the Jenkins Act, appellees would have owed no duty to disclose their sales to anyone, and their failure to disclose could not conceivably be deemed fraud of any kind. Appellees owe no taxes to the City.

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overbroad. Although the mail and wire fraud statutes have been used to prosecute cigarettes vendors and vindicate defrauded tax authorities in the past, no legal authority stands for the proposition that these statutes apply whenever a government is caused to suffer a loss of tax revenue with a but-for connection to a fraud, no matter how indirect. DeFiore itself involved the prosecution of the vendors who purchased cigarettes from out of state, that is, individuals who had an obligation to pay taxes. Id. at 760. And while these statutes have also been used to prosecute out of state sellers, that is, individuals who had an obligation to report sales to state taxing authorities, see United States v. Melvin, 544 F.2d 767, 772 (5th Cir. 1977); United States v. Brewer, 528 F.2d 492, 494 (4th Cir. 1975), there are no cases in which a failure to fulfill one's obligation to report sales to a state tax authority has been adjudged an act of fraud upon a municipal tax authority.

The tax evasion is by the purchasers of the tobacco products. Even with the Jenkins Act, which requires reporting only to state authorities, appellees have no duty to disclose anything to the City. Indeed, conspicuously absent from the City's pleadings is any claim brought pursuant to the Jenkins Act itself, rather than RICO, seeking enforcement of the Jenkins Act, effectively an admission that the Act does not protect the City. See Piper v. Chris-Craft Indus., 430 U.S. 1, 37 (1977) (no private right of action where a party is not one for whose benefit the statutory provision was enacted). There is, moreover, a Supreme Court decision in print.

In Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006), the Supreme Court held that injuries suffered by a competitor of a company that had gained a cost advantage by evading New York sales taxes were not proximately caused for RICO purposes by the tax evasion. In the Court's view, the only "direct victim" was the state taxing authority. Id. at 458.

My colleagues seek to distinguish Anza in two ways. First, they emphasize that the plaintiff in Anza was a competitor of the defendant. If anything, however, the plaintiff in Anza had a stronger case with respect to proximate causation than the plaintiff here. In Anza, the defendant was the tax evader and had thereby lowered its costs and gained a competitive advantage over the plaintiff. In the present case, the City lost tax revenue because appellees sold cigarettes to purchasers, but did not report these sales to the State, as required by the Jenkins Act; because of this failure to report, the State was unable to pass on reports of such sales to the City even if it had been inclined to do so; without reports from the State, the

City was unable to collect sales taxes from purchasers; concurrently, the purchasers individually opted not to fulfill their tax obligations to the City's taxing authorities. The City was at best an expectant gratuitous donee of information from the State, and the suggestion that the City's harm is somehow less attenuated than the plaintiff's in Anza seems to me unsustainable.

The mail and wire fraud statutes were probably aimed originally at mail-order sellers that misrepresented goods or real estate to distant buyers. They have been stretched to include a failure to provide information to state taxing authorities even where the providers of the required information owe no tax. United States v. Melvin, 544 F.2d 767 (5th Cir. 1977); United States v. Brewer, 528 F.2d 492 (4th Cir. 1975). However, this case is a further major expansion of mail fraud doctrine by allowing suits against defendants who owed no duty to provide information to the plaintiffs.

The second ground on which my colleagues seek to distinguish Anza rests on what is, in my view, a misreading of Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992). In Holmes, the Supreme Court explained that plaintiffs cannot bring RICO actions to recover for injuries caused indirectly by defendants because of: (i) the difficulty in ascertaining the amount of damages attributable to remote defendants; (ii) the challenge in apportioning recoveries among plaintiffs directly and indirectly harmed; and (iii) the notion that RICO violations will be most effectively deterred by those best poised to bring an action, i.e., the parties who were directly injured by the defendants. Id. at 269-70.

The majority accurately summarizes these justifications but then treats them as a stringent test that, if not met in other cases, overrides the direct causation requirement. See Majority Op. at 22-25. In my view, even if the Holmes' rationale is not completely apt in a particular case, a successful plaintiff must still show that it is a direct victim and, where a statutory violation is alleged to have caused the plaintiff's injury, is a member of the class the particular "statute meant to protect" and the harm was one "the statute sought to avoid." Abrahams, 79 F.3d at 237.

Moreover, the Holmes rationale applies to the present case. My colleagues' view that information provided to the State under the Jenkins Act would in fact be passed along and would, without any cost or friction whatsoever -- "as simple as counting the number of cigarette packs sold by defendants to New York City residents," Maj. Op. at 22 -- translate into precisely calculable tax revenue recovered from the various addressees is highly exaggerated.[3] A concern of taxing authorities everywhere is balancing the costs of collection against the recoverable revenue, a matter of great significance where the taxpayers are, as here, anything but inclined toward voluntary compliance. Moreover, the state appears uninterested in enforcing the Jenkins Act and may not collate or maintain accurate records of reports from out-of-state vendors or reliably pass them along. City customers, large

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[3] From the lack of any analytic discussion of the issue, I assume that my colleagues are not asserting that the measure of recoverable damages is the tax multiplied by the number of packs sold to City residents rather than the net revenue lost from the failure to file Jenkins Act reports.

numbers of individuals owing relatively small amounts in taxes, may be hard to trace, may assert various defenses in cases based solely on Jenkins Act reports, and may easily use non-City addresses. Finally, as to Holmes factor (iii), the City hardly has greater incentive to enforce the Jenkins Act through RICO than Anza-like competitors who lose sales because of their rivals' sales tax evasion.

I therefore respectfully dissent in part and concur in part.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

03 CV 383 (DAB)

[Filed March 15, 2006]

THE CITY OF NEW YORK, Plaintiff,	)
-against-	)
NEXICON, INC., f/k/a CYCO.NET, INC., RICHARD A. URREA, DANIEL R. URREA, HEMI GROUP, LLC, KAI GACHUPIN, WWW.DIRTCHEAPCIGS.COM, INC., FRED TEUTENBERG IV, FRED TEUTENBERG V, STEPHEN F. KNOPP, DMITRIY ZILBERMAN, MICHAEL E. SMITH, d/b/a PaylessCigs, Defendants.	)

March 13, 2006, Decided
March 15, 2006, Filed

OPINION

DEBORAH A. BATTS, United States District Judge.

Plaintiff City of New York (the "City" or "Plaintiff") has brought this action against Nexicon, Inc., Richard A. Urrea, Daniel A. Urrea, Hemi Group, LLC, Kai Gachupin, www.dirtcheapcigs.com, Inc. Fred Teutenberg IV, and Fred Teutenberg V[4] ("Defendants"), alleging violations of civil Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. § 1961, et seq. This Court previously granted Defendants' motions to dismiss Plaintiff's Amended Complaint in this matter, but granted Plaintiff the opportunity to amend its Complaint again, which it has done.[5] *See City of New York v. Cyco.net, Inc., et al.*, 383 F. Supp. 2d 526 (S.D.N.Y. 2005). In its Second Amended Complaint, Plaintiff seeks compensatory damages and injunctive relief, and attorney's fees. Specifically, Plaintiff seeks to recover from Defendants three times the amount of the tax revenue lost as a result of Defendants' scheme; to require Defendants prospectively to comply with the Jenkins Act; to enjoin Defendants from informing their customers that Defendants do not file Jenkins Act reports; to require Defendants to inform their customers that taxes are owed on purchases from Defendants' websites, and that Defendants do file Jenkins Act reports; to enjoin Defendants from falsely claiming that cigarettes sold to New York City

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[4] Since the filing of its Second Amended Complaint, Plaintiff has dismissed its cause of action with prejudice as to Defendants Stephen F. Knopp, Michael E. Smith, and Dmitry Zilberman.

[5] The Court notes that Plaintiff has three related lawsuits pending in this Court against other Internet tobacco companies, including *City of New York v. Esmokes, Inc., et al.*, 03 CV 10091, *City of New York v. A.E. Sales LLC, et al.*, 03 CV 7715, and *City of New York v. Smokes-Spirits.Com, Inc., et al.*, 04 CV 6616.

residents are "tax-free"; and to recover attorney's fees. The various Defendants, as explained below, move to dismiss the claims for lack of subject matter jurisdiction, lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff opposes all motions.

For the following reasons, Defendants' motions are GRANTED.

I. BACKGROUND

A. Parties

For purposes of this lawsuit, the eight named Defendants have been separated into two groups: the "Multistate Defendants," comprised of Nexicon, Inc.,[6] Richard A. Urrea, Daniel R. Urrea, Hemi Group, and Kai Gachupin; and the "Dirtcheap Defendants," comprised of www.dirtcheapcigs.com, Inc., Fred Teutenberg IV, and Fred Teutenberg V. As explained below, the Defendants are further divided into various "enterprises" for Plaintiff's purpose of alleging RICO claims.

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[6] According to a declaration by Defendant Richard A. Urrea, president of Cyco.net, Inc., his company has been dormant since June of 2003, and on January 25, 2005, it "formalized its change of name and identity to Nexicon, Inc., a publicly traded Nevada corporation." (Urrea Decl. ¶¶ 15, 17.) In their memorandum of law, these Defendants assert that Plaintiff has named the wrong corporate entity in naming "Nexicon, Inc." in the above-captioned case. For purposes of this Opinion, the Court uses both names, where appropriate.

In its Second Amended Complaint, Plaintiff formulates two different enterprises for each enterprise, as follows. Nexicon Enterprise 1 consists solely of Nexicon, Inc., and the persons associated with it are Defendant Richard Urrea, Defendant Daniel Urrea, and Brent Wolford and Chuck Arning. The Nexicon Enterprise 2 consists of Defendant Nexicon, Inc. and American Indian CigCo., LLC, a New Mexico limited liability corporation that operates the website www.silvercloudsmokeship.com and sells cigarettes over the Internet to New York City residents without filing Jenkins Act reports; the RICO persons associated with it are Defendant Nexicon, Inc., Defendant Richard Urrea, Defendant Daniel Urrea, and Brent Wolford, Chuck Arning, and Paul Rainbird, owner of American Indian CigCo., LLC. (2d Am. Compl. §§ 63-64; 3d Am. Rico Stmt at 13.)

The Hemi Group Enterprise 1 consists solely of Hemi Group, LLC, and the person associated with it is Defendant Kai Gachupin. The Hemi Group Enterprise 2 consists of Hemi Group LLC and A1 Enterprises, Inc., a corporation formed under the laws of the State of New Mexico, which sells cigarettes over the Internet, and the persons associated with it are Defendants Kai Gachupin and Hemi Group LLC. (2d Am. Compl. § 71; 3d Am. Rico Stmt at 13.)

Dirtcheap Enterprise 1 consists solely of www.dirtcheapcig.com, Inc., and the persons associated with it are Defendant Fred Teutenberg IV, Defendant Fred Teutenberg V, and Margaret Armends, Paul Taylor, Craig Taylor, and Bill Mulkey. Dirtcheap Enterprise 2 consists of Defendant www.dirtcheapcig.com, Inc., and the RICO persons associated with it are Defendant

www.dirtcheapcig.com, Inc., Defendant Fred Teutenberg IV, Defendant Fred Teutenberg V, and Margaret Armends, Paul Taylor, Craig Taylor, and Bill Mulkey.

B. Facts

The factual background of this dispute has been set forth fully in the Court's prior Opinion on Defendants' motions to dismiss, and will not be repeated here.

Since the filing of the First Amended Complaint, Plaintiff states that the City obtained sales records, which included the names, addresses and numbers of cartons of cigarettes purchased by New York City residents from two Virginia-based Internet cigarette retailers. (Id. ¶¶ 58-59.) In January of 2005, the City's Department of Finance contacted these residents, who together owed approximately $ 1 million in taxes on cigarettes purchased over the Internet, and so far the City has collected over $ 400,000 of the taxes owed. (Id. ¶¶ 12, 59.)

New York Public Health Law 1399-ll prohibits any common or contract carrier from transporting cigarettes to any unauthorized person in the state.[7]

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[7] N.Y. Pub. Hlth Law § 1399-ll (2) states in part:

> It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than [a licensed cigarette tax agent or wholesale dealer, an export warehouse proprietor or operator, or an officer, employee or agent of the government] . . . . For purposes of the preceding sentence, if cigarettes are transported to

Since New York Public Health Law 1399-ll went into effect,[8] the Dirtcheap Defendants have ceased shipping any cigarettes to people in New York, and "Dirtcheapcig.com has no intention of shipping cigarettes into New York so long as N.Y. Pub. Hlth. Law 1399-ll is in effect or any other applicable New York law prohibits shipment thereto." (Teutenberg IV Decl. ¶ 28; see also Teutenberg V Aff. ¶ 7 ("I have not shipped cigarettes to New York in contravention of N.Y. Pub. Hlth. L. § 1399-ll since its effective date. I will not ship cigarettes to New York so long as N.Y.

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a home or residence, it shall be presumed that the common or contract carrier knew that such person was not a person described in paragraph (a), (b) or (c) of subdivision one of this section. It shall be unlawful for any other person to knowingly transport cigarettes to any person in this state, other than to a person described in paragraph (a), (b) or (c) of subdivision one of this section. Nothing in this subdivision shall be construed to prohibit a person other than a common or contract carrier from transporting not more than eight hundred cigarettes at any one time to any person in this state.

[8] N.Y. Pub. Hlth Law § 1399-ll went into effect on November 14, 2000. The New York State Senate passed the bill on June 14, 2000, the Assembly passed it on June 15, 2000, and Governor George Pataki signed the bill into law on August 16, 2000. However, Plaintiff cigarette sellers initiated lawsuits, later consolidated, claiming the statute violated the *Commerce Clause*. *See Santa Fe Natural Tobacco Co. v. Spitzer*, 2001 U.S. Dist. LEXIS 7548, Nos. 00-7274, 00-7750 2001 U.S. Dist. LEXIS 7548, 2001 WL 636441 (S.D.N.Y. June 8, 2001). The district court struck the statute down as unconstitutional, and permanently enjoined its enforcement. *Id.* Defendants-appellants, the Governor of the State of New York and other State officials, appealed the judgment, and the Second Circuit reversed the lower court's ruling and found the statute constitutional. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 219 (2d Cir. 2003).

Pub. Hlth. L. § 1399-ll is in effect.") Furthermore, on March 8, 2005, the Dirtcheap Defendants filed Jenkins Act reports with the State of New York for all sales of cigarettes that www.dirtcheapcig.com, Inc. had ever made to New York residents. (Teutenberg IV Aff. ¶¶ 30, 31; Teutenberg Aff. Exh. B.)

C. Procedural History

Plaintiff originally filed its Amended Complaint against sixteen Defendants, alleging violations of civil RICO, New York General Business Law § 349, and common law fraud. The various Defendants moved to dismiss the Amended Complaint pursuant to Fed. R. Civ Pro. 9(b), 12(b)(2), 12(b)(3), and 12(b)(6), and to transfer venue pursuant 28 U.S.C. §§ 1406(a) and 1404(a). In its January 27, 2005 Opinion, the Court denied Defendants' motions to dismiss based on improper venue and personal jurisdiction, granted Defendants' motions to dismiss for failure to state a claim under General Business Law § 349 and common law fraud, and granted Defendants' motions to dismiss for failure to state a claim under the RICO statute, but gave Plaintiff the opportunity to file a Second Amended Complaint for the limited purpose of curing the deficiency it found in Plaintiff's allegations of RICO enterprises. Plaintiff filed a Second Amended Complaint, and Defendants filed the instant motions to dismiss the Second Amended Complaint.

II. DISCUSSION

A. Standard of Review

1. Fed. R. Civ. Pro. 12(b)(1)

In considering a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court must assume as true factual allegations in the complaint. *See Shipping Fin Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). However, when resolving issues surrounding subject matter jurisdiction, a district court is not confined to the Complaint and may refer to evidence outside the pleadings, such as affidavits. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)); *London v. Polishook*, 189 F.3d 196, 199 (2d Cir. 1999) ("It is the affirmative burden of the party invoking such [federal subject matter] jurisdiction . . . to proffer the necessary factual predicate--not simply an allegation in a complaint--to support jurisdiction.") (citation omitted).

The court should consider a 12(b)(1) motion before ruling on any other motions to dismiss, as dismissal of an action for lack of subject matter jurisdiction will render all other defenses and motions moot. *See United States ex rel Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1155-56 (2d Cir. 1993); *Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990) (holding that when defendants move for dismissal on a number of grounds, the court should "consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint

for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined") (citation omitted).

2. Fed. R. Civ. Pro. 12(b)(6)

When deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must read the complaint generously, accepting as true the factual allegations in the complaint and drawing all inferences in favor of the pleader. *Bolt Elec. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). The Court will grant such a motion only if, after viewing plaintiff's allegations in a most favorable light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992).

While a court considering a Rule 12(b)(6) motion to dismiss for failure to state a claim is limited to the facts stated in the complaint, the complaint includes any written instrument attached as an exhibit and any statements or documents incorporated by reference into the complaint. *See Paulemon v. Tobin*, 30 F.3d 307, 308-09 (2d Cir. 1994); *Rombach v. Chang*, 355 F.3d 164, 169 (2d Cir. 2004). In addition, the Court may consider the factual allegations in Plaintiff's RICO Statement as a supplement to the complaint. *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506, 515 (S.D.N.Y. 1997). Courts may also consider "documents either in plaintiff's possession or of which plaintiff [] had knowledge and relied on in

bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

B. Mootness

The Dirtcheap Defendants argue that because they have now filed Jenkins Act reports for every shipment of cigarettes ever made to New York State, Plaintiff's claims against them are moot, and, under Article III of the U.S. Constitution, must be dismissed for lack of subject matter jurisdiction. (Dirtcheap Mem. at 2.) Plaintiff argues that Defendants have ceased their unlawful conduct; they have not provided necessary evidence that the alleged violation will not recur, nor have they provided evidence of "eradication of the effects of the violation." (Pl. Mem. in Opp. to Dirtcheap Defs. at 2, 5.) According to Plaintiff, regardless, any question regarding mootness is one of fact that may not be resolved on a motion to dismiss. (Id.)

Article III of the U.S. Constitution limits federal court jurisdiction to live cases and controversies. *See Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005); *Van Wie v. Pataki*, 267 F.3d 109, 113 (2d Cir. 2001) (citing *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998)). If a claim becomes moot, the court loses jurisdiction over the suit, which necessarily must be dismissed. *Lillbask*, 397 F.3d at 84 (citing *Russman v. Board of Educ.*, 260 F.3d 114, 118-119 (2d Cir. 2001)). Mootness deprives the Court of its power to act because there is nothing for it to remedy, even if inclined to do so. *See Spencer v. Kemna*, 523 U.S. 1, 18, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998).

An exception to the principle of mootness is the voluntary cessation doctrine. A defendant's voluntary cessation of certain activities may render a case moot, but only if the defendant can demonstrate that: "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Lillbask*, 397 F.3d 77, 88 (quoting *Lamar Adver. of Penn., LLC v. Town of Orchard Park*, 356 F.3d 365, 375 (2d Cir. 2004) (citations and quotations omitted); *see also Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003). It must be "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors v. Slater*, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)). This burden on the defendant to prove that the conduct will not recur is heavy. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

Based on N.Y. Pub. Hlth Law § 1399-ll, prohibiting the sale of out-of-state cigarettes to New York State residents, and based on Dirtcheap Defendants' sworn affidavits attesting to the fact that they will not sell any cigarettes to New York State residents as long as § 1399-ll is in full force and effect, the Court is satisfied that there is a more than a reasonable expectation that Dirtcheap Defendants' alleged violation of selling cigarettes to New York City residents without filing Jenkins Act reports will not recur and the effects of Defendants' violation have been entirely eradicated.

Generally a mootness claim fails where a complaint seeks damages. *See Van Wie*, 267 F.3d 109, 115 n.4 (noting that asserting even nominal damages in addition to injunctive relief can avoid mooting a claim); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 393-94, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533.3, at 262 (2d ed. 1984)). However, claims for attorney's fees are not enough to sustain jurisdiction over a suit. *See Cook*, 992 F.2d at 19; London v. Polishook, 189 F.3d 196, 200.

Dirtcheap Defendants argue that because Plaintiff admits that Defendants do not owe Plaintiff any City taxes, are not responsible for collecting City taxes, and are not holding any City tax revenues, Plaintiff has no viable claim, and does not have any "legally cognizable damages" that it could collect. (Dirtcheap Defs. Mem. at 4-5.) Plaintiff states that the Defendant's filings do not moot the case because Defendants "cannot establish that the City will recover all of its damages through the turn-over of Jenkins reports." (Pl.'s Mem. in Opp. to Dirtcheap Defs. at 7.) Plaintiff argues that even with the Jenkins Act reports, which enable the City to seek the taxes owed to it, it cannot claim a perfect collection record, and is only able to recover "some fraction of the amount sought." (Id.) Furthermore, Plaintiff argues that the Dirtcheap Defendants are liable for the City's costs of investigating and recovering from the fraud, under common law or RICO. (Id.)

"[Predicate] acts are, when committed in the circumstances delineated in § 1962, 'an activity which

RICO was designed to deter', and recoverable damages 'will flow from the commission of these predicate acts.'" *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988) (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)). The Court previously found that Defendants' act of not filing Jenkins Act reports resulted in fraud against the Plaintiff. However, where Defendants have fulfilled their obligation to file the reports, there is no basis to find the Defendants liable for damages, because the consumers alone are responsible for paying the taxes owed. Once the reports are filed, Plaintiff cannot claim that Defendants are proximately causing Plaintiff's injury, and therefore, Defendants cannot be held liable for Plaintiff's damages. Furthermore, once Defendants submit the Jenkins Act reports, their burden is complete, and they have no responsibility whatsoever to ensure that Plaintiff successfully recovers the taxes owed. Even if Defendants had been turning over the Jenkins Act reports regularly in the past, there is no reason to conclude that Plaintiff would have collected 100 percent of the taxes owed, and this imperfect collection record hardly could be attributable to Defendants. Accordingly, because Dirtcheap Defendants voluntarily have ceased the offending conduct, and as there is no outstanding question regarding damages, Dirtcheap Defendants' motion to dismiss based on lack of subject matter jurisdiction is GRANTED; Dirtcheap Defendants are dismissed from the case.

C. Distinctness of Enterprises

In its prior Opinion, the Court allowed Plaintiff to file a Second Amended Complaint to address deficiencies in how it pled the distinctness element

required to establish an enterprise under the RICO statute. In its Second Amended Complaint, Plaintiff pleads two alternative enterprises for each group of Defendants: each Enterprise One is comprised of the corporation, "a passive vehicle, the affairs of which are conducted by the individual defendants associated with that corporation;" and Enterprise Two is comprised of the same corporation, associated-in-fact with other corporations and associated individuals. (3d Am Rico Stmt at 12.) The Multistate Defendants argue that despite being afforded the opportunity to re-assert distinct RICO enterprises, Plaintiff's new alternative enterprises fail to identify a RICO "person" separate from a RICO "enterprise." (Multistate Defs.' Mem. at 17.)

Section 1962(c) states, "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." An enterprise must be supported by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An "association-in-fact enterprise" has been described by the Supreme Court as "a group of persons associated together for a common purpose of engaging in a course of conduct," which may be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."

452 U.S. at 583. The Second Circuit also requires that a nexus exist between the enterprise and the racketeering activity alleged. *See First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004) (citations omitted).

Importantly, the enterprise as alleged must be distinct from the person conducting the affairs of the enterprise. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001); *De Falco*, 244 F.3d 286, 307 (citing cases). A plaintiff may not allege "a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *see also Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) ("[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity."). "Where employees associate with their corporate employer solely for the purpose of carrying on the regular affairs of the employer, it cannot be said that the corporation is a separate enterprise." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995). However, the language of § 1962(c) indicates that a single entity may be both the RICO person and a member of the enterprise, and the Second Circuit has determined that a corporation can be both a defendant and part of an enterprise as long as it does not comprise the entire enterprise. *Riverwoods*, 30 F.3d 339, 344; *see also Cullen v. Margiotta*, 811 F.2d 698, 729-730 (2d Cir. 1987) ("We see no reason why a single entity could not be both the RICO "person" and one of a number of members of the RICO

"enterprise."). Furthermore, the Supreme Court found in *Cedric Kushner,* that a corporation named as an enterprise was distinct from the person alleged, who also was the president and sole shareholder of the corporation, because the corporation was a "legally different entity with different rights and responsibilities." 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L. Ed. 2d 198.

According to Plaintiff, all of the enterprises alleged display continuity of structure and personnel, each has a consensual decision-making structure, and each engages in a common course of conduct, both legal and illegal. (2d Am. Compl. ¶ 66, 73, 81.) Plaintiff also contends that all of the enterprises exist separately from the unlawful activity, and they would continue to exist even in the absence of the predicate offenses, and furthermore, that the associates of the enterprises have common links other than racketeering activity. (2d Am. Compl. ¶ 68, 83, 75.)

1. Enterprise One

Plaintiff alleges that Nexicon Enterprise 1 consists solely of Nexicon, Inc., and that the RICO persons who conduct its affairs are Defendant Richard Urrea, Defendant Daniel Urrea, and Brent Wolford and Chuck Arning. (2d Am. Compl. ¶¶ 61-62; 3d Am. Rico Stmt at 13.) According to Plaintiff, Hemi Group Enterprise 1 consists solely of Hemi Group, LLC, and the RICO person who conducts its affairs in a forbidden manner is Defendant Kai Gachupin. (2d Am. Compl. ¶¶ 69-70; 3d Am. Rico Stmt at 13.)

Multistate Defendants argue that Plaintiff's description of Enterprise 1 as being comprised of a

passive corporation infiltrated by certain persons fails because none of the individual RICO persons committed any RICO predicate acts. (Multistate Defs.' Mem. at 22; Multistate Defs.' Reply. at 8.) They argue that the Defendant officers did not sell cigarettes in interstate commerce and had no duties to register or file with New York State, because only the companies had a responsibility to file such reports.[9] (Id.)

The structure of Enterprise 1 for the groups of Defendants is different than the enterprise alleged in *Riverwoods,* which involved a single corporate entity alleged to be both the person and an enterprise associated with its employees, 30 F.3d 339, at 344, and it is different than *Discon, Inc. v. NYNEX Corp.* which involved an enterprise comprised of three corporations, each alleged to be persons who conducted the affairs of the enterprise illegally. 93 F.3d 1055, 1063 (2d. Cir. 1996). The structure of Enterprise 1 here is similar to the enterprises alleged in *Cedric Kushner Promotions, Ltd. v. King* and *Moses v. Martin*, 360 F. Supp. 2d 533 (S.D.N.Y. 2004) and found to be legitimate. In those cases and here, the enterprise is in effect an innocent corporation, with its own legal basis for existing, and the persons are employees or officers of the organization unlawfully directing the enterprise's racketeering activities.

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[9] Multistate Defendants also argue specifically that Plaintiff's claim against Cyco.net fails because it sold its tobacco business to another company, and therefore, Plaintiff cannot show that Cyco.net has committed any specific actions. (Nexicon Defs.' Mem. at 23.) However, on a motion to dismiss, the facts alleged in the Complaint are deemed true.

However, in *Cedric Kushner* and *Martin,* the employee persons were entirely capable of committing illegal acts in furtherance of the racketeering activity, which is not the case here. The Second Amended Complaint refers repeatedly to "Defendants," a term that would appear to include the individual Defendants as well as the corporate Defendants. However, Plaintiff specifically states in describing the parties that Nexicon, Inc. and Hemi Group, LLC "[have] never filed Jenkins Act reports with New York State nor [have they] registered with New York State as an interstate cigarette seller." (2d Am. Compl. ¶¶ 20, 24.) There is no similar language to describe the conduct of the individual Defendants, leading to the conclusion that only the company itself is responsible for filing the reports.

Furthermore, the language of the Jenkins Act prohibits "persons" from transferring cigarettes for profit in interstate commerce. The statute defines "person" as including: "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 15 U.S.C. § 375(1). Employing basic statutory construction analysis, it is clear that companies are the primary entities responsible for filing Jenkins Act reports. The catch-all phrase "as well as individuals" suggests a separate class of people who may be liable under the Jenkins Act, but does not by any means connote officers or directors of the business entities listed before the phrase. Accordingly, as only the Defendant companies are responsible for filing the reports, and only they can be accused of fraudulently concealing such reports by not filing them, only the Defendant companies may be considered as having committed predicate acts. Thus, only they may properly be

considered "persons" under the definition of the Jenkins Act *and* under RICO. Given the unique facts of the instant case, where a company is statutorily required to perform a function that it fails to do, resulting in fraud, as alleged in the Second Amended Complaint, the "persons" for purposes of RICO cannot be the officers of the companies, but must be the companies themselves. Accordingly, Defendants' motion to dismiss the Second Amended Complaint for failure to plead all the elements of RICO on the Enterprise 1 theory, namely, the existence of an enterprise, is GRANTED.

2. Enterprise Two

According to Plaintiff, Nexicon Enterprise 2 is comprised of Defendant Nexicon Inc. and American Indian CigCo., LLC, and the RICO persons who conduct the affairs of this enterprise are Defendant Nexicon, Inc., Defendant Richard Urrea, Defendant Daniel Urrea, Brent Wolford, Chuck Arning and Paul Rainbird, (2d Am. Compl. ¶¶ 63-64; 3d Am. Rico Stmt at 13.) Hemi Group Enterprise 2 is comprised of Hemi Group LLC and Al Enterprises, Inc., and the RICO persons who conduct the affairs of the enterprise are Defendants Kai Gachupin and Hemi Group LLC. (2d Am. Compl. ¶ 71; 3d Am. Rico Stmt at 13.)

Multistate Defendants argue that Cyco.net, Inc. is a New Mexico corporation that conducted a retail tobacco business, which terminated its service to New York State customers in March 2003, and was then sold to another entity in June of 2003, and since then, has been dormant. (Cyco.net Mem. at 18.) The Multistate Defendants allege that the parent company, which changed its name from Cyco.net, Inc. to

Nexicon, Inc. in January of 2005, is a publicly traded corporation incorporated in Nevada, engaged in businesses that have nothing to do with tobacco retailing. (Cyco.net Mem. at 18.) The Defendants argue that Plaintiff has failed to show how Cyco.net, after it was sold, committed any actions that would constitute the requisite control necessary for an association-in-fact enterprise. (Cyco.net Mem. at 20.) The Hemi Group Defendants argue that they operate a packaging and fulfillment service, packaging goods sold by other retailers, including for a short time, Al Enterprises, and delivering the packaged goods to the U.S. Postal Service. (Hemi Group Mem. at 23; Multistate Defs.' Reply at 9.) They argue that Hemi Group did not sell goods to Al Enterprise's customers, and did not have any operational or managerial control over Al Enterprises. (Hemi Group Mem. at 23.)

A plaintiff must allege that an association-in-fact enterprise is an "ongoing organization, formal or informal," and must show that the associates functioned "as a continuing unit." *Turkette*, 452 U.S. 576, at 583. Plaintiff also must show "hierarchy, organization, and activities" of an alleged association-in-fact enterprise. *United States v. Coonan*, 938 F.2d 1553, 1560 (2d Cir. 1991). A plaintiff also must allege a nexus between the enterprise and the RICO predicate acts. *See Satinwood*, 385 F.3d 159, 174.

Plaintiff is well aware that an enterprise cannot merely be comprised of employees associating with their corporate employer (*see Securitron*, 65 F.3d 256, 263), therefore it appears here to have formed an enterprise by tacking on another company with which each corporate Defendant "associated." While the structure of such enterprises technically is legitimate,

such a configuration must still have "ongoing organization, formal or informal," and it must show that its "various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Plaintiff asserts in a conclusory manner that Defendants and others who comprise the enterprise shared common fraudulent purposes and plans. However, this is not enough. "Plaintiffs' 'conclusory naming of a string of entities does not adequately allege an enterprise.'" *Satinwood*, 385 F.3d 159, 175 (quoting *Moy v. Terranova*, 1999 WL 118773, at *5 (E.D.N.Y. Mar. 2, 1999) (internal quotation marks omitted)). *See also First Nationwide Bank*, 820 F. Supp. 89, 98 ("Conclusory allegations that disparate parties were associated in fact by virtue of their involvement in the real estate industry . . . are insufficient to sustain a RICO claim, absent allegations as to how the members were associated together in an 'enterprise.'"). Plaintiff furthermore has failed to allege a nexus between the Enterprise 2s and the RICO predicate acts, and also has failed to explain each participant's role in the alleged course of fraudulent conduct. Accordingly, Plaintiff has failed to allege that the Enterprise 2s are in fact RICO enterprises.

Plaintiff merely argues in its Amended Complaint and accompanying RICO Statement, that the members of the Enterprise 2 share a common purpose to enrich themselves by selling tax-free cigarettes to consumers in New York City who would otherwise be taxed, without alleging facts about the non-defendants who are part of the associations-in-fact. Plaintiff alleges that American Indian CigCo and A1 Enterprises assist the various corporate Defendants in concealing cigarette sales previously made to New York City

residents (3d Am. Rico Stmt at 6-7), but does not satisfy the requirement that the entities share a common purpose. And, critically, there has been no showing that the associates have anything to do with Defendants' allegedly fraudulent acts. There is no indication that the Defendants worked in tandem to carry out the scheme of defrauding Plaintiff. Plaintiff merely alleges that Defendants have relationships with these other companies, but has not shown how the various components of the enterprise engaged in a fraudulent course of conduct together.

The Court finds that Plaintiff's pleadings fail to allege association-in-fact enterprises, and therefore, that plaintiff has failed to make out a RICO claim. Accordingly, Multistate Defendants' motion to dismiss the Second Amended Complaint for failure to plead all the elements of RICO on the Enterprise 2 theory, namely, the existence of an enterprise, is GRANTED.

F. Other Claims

Because the Court dismisses the case, it does not reach Defendants' other bases for dismissal, and finds that because the underlying claims fail, Plaintiffs' conspiracy claim under 18 U.S.C. § 1962(d) fails, as well. Accordingly, Defendants' motion to dismiss on this basis is GRANTED.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Dirtcheap Defendants' motion to dismiss based on lack of subject matter jurisdiction; and hereby GRANTS remaining Defendants' motions to dismiss for failure to state a claim upon which relief

may be granted as to the existence of any enterprise. The Clerk is respectfully directed to close this case.

SO ORDERED.

Dated: New York, New York

March 13 2006

Deborah A. Batts

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 03 CV 383 (DAB)

[Filed January 27, 2005]

THE CITY OF NEW YORK,
Plaintiff,

-against-

CYCO.NET, INC., RICHARD A. URREA, DANIEL R. URREA, HEMI GROUP, LLC, KAI GACHUPIN, DIRTCHEAPCIGS.COM, INC., FRED TEUTENBERG IV, FRED TEUTENBERG V, MICHAEL E. SMITH, d/b/a PaylessCigs, HOORAY'S INC., STEPHEN F. KNOPP, DMITRIY ZILBERMAN, S4L DISTRIBUTING, INC., WILLIAM C. BAKER III, DOUBLE B DISTRIBUTING, d/b/a Discount Tobacco Store, WILLIAM J. BEVINS, Jr.,
Defendants.

January 27, 2005, Decided
January 27, 2005, Filed

OPINION

DEBORAH A. BATTS, United States District Judge.

Plaintiff City of New York (the "City") has brought this action against Defendants, alleging violations of civil Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. § 1961, et seq., New York General Business Law § 349 and common law fraud.[1] Plaintiff seeks compensatory damages and injunctive relief, in the form of an end to Defendants' allegedly fraudulent and illegal activities, and attorney's fees. The various Defendants, as explained below, move to dismiss the claims for failure to plead fraud with particularity, for lack of personal jurisdiction, for improper venue, pursuant to Rules 9(b), 12(b)(2), 12(b)(3), and 12(b)(6) of the Federal Rules of Civil Procedure, respectively, and to transfer venue, pursuant to 28 U.S.C. §§ 1406(a) and 1404(a).

The 16 named Defendants have been separated into three groups for purposes of this lawsuit: the Multistate Defendants, the Dirtcheap Defendants, and the Bulkcigs Defendants. For the purposes of this lawsuit, Defendants Cyco.net, Richard A. Urrea, Daniel R. Urrea, Hemi Group, Kai Gachupin, Michael E. Smith, Hooray's Inc., Stephen F. Knopp, and Dmitriy Zilberman have joined together as the

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[1] The Court notes that the Plaintiff City has filed three similar lawsuits against numerous defendant Internet tobacco companies, including: *City of New York v. Esmokes, Inc.* at al., 03 CV 10091, *City of New York v. A.E. Sales LLC, et al.*, 03 CV 7715, and *City of New York v. Smokes-Spirits.Com, Inc., et al.*, 04 CV 6616. Defendants in those cases have filed motions to dismiss on similar grounds as here.

"Multistate Defendants."[2] Defendants S4L, Inc., William C. Baker, Double B, and William Bevins filed their motion jointly under common representation as the "Bulkcigs Defendants." Defendants www.Dirtcheapcigs.com, Fred Teutenberg IV, and Fred Teutenberg V, have joined together as the "Dirtcheap Defendants." Otherwise, aside from the employee-employer relationships described below, these individuals and enterprises are separate and unrelated enterprises. (Am. Compl. ¶ 65).

Defendants Fred Teutenberg IV and Fred Teutenberg V move to dismiss for lack of personal jurisdiction based on Fed.R.Civ.P. 12(b)(2). The Multistate Defendants, the Dirtcheap Defendants, and the Bulkcigs Defendants move to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3) and 28 U.S.C. § 1406(a). The Multistate Defendants and the Bulkcigs Defendants also move in the alternative for transfer of venue under 28 U.S.C. §§ 1406(a) and 28 U.S.C. § 1404(a). The Multistate Defendants and the Dirtcheap Defendants move to dismiss for failure to state claims upon which relief can be granted under Fed.R.Civ.P. 12(b)(6) and *9(b)*.

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[2] Originally, Defendants Hemi Group and Kai Gachupin filed Fed.R.Civ.P. 12(b) motions together, but separately from the Multistate Defendants. However, they joined the Multistate Defendants in their Reply to Plaintiff's Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss. Despite being considered a part of the Multistate Defendants, this Opinion makes reference to the "Hemi Group's" Memo of Law, where appropriate.

Plaintiff opposes all motions. For the following reasons, Defendants' motions are DENIED in part and GRANTED in part.

I. BACKGROUND

The facts, summarized below, are taken from the Amended Complaint and the Amended RICO Statement,[3] the allegations of which must be assumed to be true for purposes of these motions to dismiss. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d. 80, 84 (1957); *McGinty v. State of New York*, 193 F.3d 64, 68 (2d Cir. 1999).

A. The Scheme

Plaintiff alleges that the Defendants conducted the management and operation of the affairs of their own enterprises, directly or indirectly, through a pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961(1)(B), 1961(5), and 1962(c), in violation of 18 U.S.C. § 1962(c), consisting of continuous and multiple instances of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. (Am. Compl. ¶¶ 16, 64, 80, 90.)

Specifically, Plaintiff contends that the Defendants agreed to a plan within an enterprise, whereby cigarettes would be sold to New York City residents without informing New York State tax authorities of

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[3] A RICO Statement is a document required by the Court in actions alleging RICO violations to assist the Court in determining the validity of the Plaintiff's claims. The Court views the RICO Statement as an extension of the Complaint and will refer to it to assist the Plaintiff in establishing its claims.

the sales, and/or by falsely advertising the cigarettes as "tax-free," and/or by advertising that sales will not be reported to the New York State tax authorities. (Am. Compl. ¶ 84). Plaintiff alleges that the scheme to defraud New York City is precisely the purpose of each enterprise. (Am. Compl. ¶ 85.) Further, Plaintiff alleges that Defendants' business plans depend upon (1) concealment of their customers' purchases from state tax authorities; (2) informing their customers of Defendants' policies of concealment; and (3) concealing purchasers' tax liability from the purchasers themselves. (Am. Compl. ¶ 10-12.)

Consequently, each time Defendants use the mails or wires to effect a sale of cigarettes to New York City residents while subsequently failing to file a record of the sale with the New York State tax authorities, in compliance with the Jenkins Act, 15 U.S.C. § 375 et seq., an instance of mail or wire fraud has been committed. (Am. Compl. ¶¶ 16, 64, 81, 90, 91). The relevant part of the Jenkins Act provides:

> Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall--
>
> > (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of this

> principal place of business and of any other place of business; and
>
> (2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

15 U.S.C. 376(a).

Plaintiff's third and fourth claims assert that Defendants' business practices violate New York State's General Business Law § 349 and furthermore, constitute fraud under the common law. (Am. Compl. ¶¶ 107, 108, 109, 111, 112, 113.) In particular, Plaintiff cites two practices as deceptive and misleading and thus, unlawful under GBL § 349: (1) Defendants' failure to file the Jenkins Act Reports with the New York State tax authorities and (2) Defendants' on-line representations to its customers that the Defendants are not legally required to file such reports and/or can sell cigarettes "tax free" on the Internet. (Id.)

B. The Defendants

Plaintiff alleges that the Defendants' illegal and fraudulent conduct is carried out by seven enterprises: the "Aabakismokes Enterprise," the "Cigarettespecials Enterprise," the "Dirtcheapcigs Enterprise," the

"Paylesscigs Enterprise," the "Smokes-Direct Enterprise," the "Bulkcigs Enterprise," and the "DiscountTobacco Enterprise."[4] (Am. Compl. ¶ 62.) As explained in detail below, the following Defendants comprise the following enterprises: Defendants Cyco.net, Richard Urrea, and Daniel Urrea comprise the Aabakismokes Enterprise; Defendants Hemi Group, LLC and Kai Gachupin comprise the Cigarettespecials Enterprise; Defendants Dirtcheapcigs.com, Fred Teutenberg IV, and Fred Teutenberg V comprise the Dirtcheapcigs Enterprise; Defendant Michael E. Smith comprises Paylesscigs Enterprise; Defendants Hooray's, Stephen Knopp, and Dmitriy Zilberman comprise the Smokes-Direct Enterprise; Defendants S4L Distributing, Inc. and William C. Baker III comprise the Bulkcigs Enterprise; and Defendants Double B Distributing and William J. Bevins comprise the DiscountTobacco Enterprise. (Am. RICO Stmt. at 1-5.) Each enterprise is a competitor in as much as each sells cigarettes via the Internet. Defendant enterprises reside in and operate from four different states: Kentucky, Missouri, New Mexico and Virginia.

1. Multistate Defendants

For the purposes of this lawsuit, Defendants Cyco.net, Richard A. Urrea, Daniel R. Urrea, Hemi Group, Kai Gachupin, Michael E. Smith, Hooray's Inc., Stephen F. Knopp and Dmitriy Zilberman have joined

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[4] Plaintiff mistakenly refers to "DiscountTobacco Enterprise" as the "Double B Enterprise" elsewhere in its Amended Complaint. *See* (Am. Compl. ¶ 34.) This Opinion only refers to DiscountTobacco Enterprise.

together to file their 12(b)(3) motion to dismiss. (Pl.'s Mem. of Law at 1.) Plaintiff alleges the Multistate Defendants consist of four separate enterprises: the Aabakismokes Enterprise, the Cigarettespecials Enterprise, the Paylesscigs Enterprise, and the Smokes-Direct Enterprise.

a. Aabakismokes Enterprise

Plaintiff alleges the Aabakismokes Enterprise includes Defendants Cyco.net, Inc., Richard Urrea and Daniel Urrea.

Defendant Cyco.net, Inc. is a publicly traded corporation, organized under the laws of the State of New Mexico with a principal place of business in Albuquerque, New Mexico. (Am. Compl. ¶ 20.) Plaintiff alleges Defendant Cyco.net is an associate of Aabakismokes Enterprise (Am. Compl. ¶ 67), and that Cyco.net owns and/or controls the Aabakismokes Enterprise.

Cyco.net, Inc. employs four people, all of whom reside in the District of New Mexico. (Urrea Decl. ¶ 6; Am. RICO Stmt. at 2.) Plaintiff alleges that the Aabakismokes Enterprise operates the Internet websites www.aabakismokes.com and www.cycocigs.com. Plaintiff alleges that at the direction of Cyco.net and its principals, Defendants Daniel Urrea and Richard Urrea, the Aabakismokes Enterprise sells cigarettes to New York City residents and conceals the sales from New York State tax authorities. Approximately forty percent of the Aabakismokes Enterprise's Internet sales are to New York residents. (Am. Compl. ¶ 20.) Plaintiff alleges that Cyco.net has offered "premium give-aways" in New York City to

promote its services. (Am. RICO Stmt. at 2.) Moreover, Plaintiff asserts that Cyco.net also directs the enterprise to make misrepresentations regarding its responsibilities under the Jenkins Act (Am. RICO Stmt. at 2). Specifically, Plaintiff alleges that the Aabakismokes Enterprise states on its website that "at no time will we sell, copy or transfer our email list or customer names and addresses to any person or entity including governments." (Am. Compl. ¶ 53(a).)

Defendant Richard A. Urrea, President of Defendant Cyco.net, is a citizen of the State of New Mexico. (Am. Compl. ¶ 21.) Defendant Daniel R. Urrea, Chief Financial Officer of Defendant Cyco.net., is also a citizen of the State of New Mexico. (Am. Compl. ¶ 22.) Richard Urrea owns and operates Cyco.net, Inc. (Urrea Decl. ¶ 1.) Both Richard Urrea and Daniel Urrea are substantial shareholders of the enterprise (Am. RICO Stmt. at 2.)

Plaintiff alleges that Defendants Richard Urrea and Daniel Urrea are associates of the Aabakismokes Enterprise. (Am. Compl. ¶ 67.) Plaintiff alleges that in this capacity, Richard and Daniel Urrea direct the enterprise to conceal sales to New York City residents from the New York State taxing authorities and also make false statements concerning tax liability to New York City residents. (Am. RICO Stmt. at 2).

b. Cigarettespecials Enterprise

Plaintiff alleges the Cigarettespecials Enterprise is composed of Defendant Hemi Group, LLC and Defendant Kai Gachupin. For the purposes of this action, Defendants Gachupin and Hemi Group have filed a Reply jointly with the Multistate Defendants.

Defendant Hemi Group, LLC ("Hemi Group") is a limited liability New Mexico corporation with its principal place of business in the Pueblo of Jemez, a federally recognized sovereign nation of North American Indians. (Am. Compl. ¶ 23; Gachupin Decl. ¶ 4.) All of Hemi Group's facilities, offices, assets, books and records are located in Pueblo of Jemez, with the exception of an administrative office in Albuquerque; both Pueblo of Jemez and Albuquerque are in the District of New Mexico. (Gachupin Decl. ¶ 15.)

Plaintiff alleges that Defendant Hemi Group is an associate of the Cigarettespecials Enterprise. (Am. Compl. ¶ 68.) Plaintiff alleges that Defendant Hemi Group owns or controls the CigaretteSpecials Enterprise, a retail cigarette outlet referred to variously as "Cigarettespecials," "BuyDiscount Cigarettes," "FreeCigs4u," "Cybercigarettes" and "Adobe Cigarettes," that sells cigarettes over the Internet via five web addresses: www.cigarettespecials.com, www.BuyDiscountCigarettes.com, www.cybercigarettes.com and www.AdobeCigarettes.com. (Am. Compl. ¶ 23.) According to Plaintiff, Hemi Group directs the Cigarettespecials Enterprise to sell cigarettes to New York City residents, to conceal the sales from the New York State tax authorities, and to make misrepresentations to New York City residents concerning cigarette sales and excise tax liability. (Am. RICO Stmt. at 2.) Specifically, Plaintiff alleges the Cigarettespecials Enterprise states on its websites that it does not share customers' personal information with any other company, government agency or state taxing authority; and make statements that sales have "no

tobacco tax;" and that "all sales are tax free." (Am. Compl. ¶ 53(b).)

Defendant Kai Gachupin resides in New Mexico and is the sole owner of Hemi Group. (Am. Compl. ¶ 24; Gachupin Decl. ¶ 3.) Plaintiff alleges that Defendant Gachupin is an associate of the Cigarettespecials Enterprise and directs the enterprise to make sales to New York City residents, conceal those sales from the New York State tax authorities and also make misrepresentations to New York City residents concerning cigarette sales and excise tax liability. (Am. Compl. ¶ 69; Am. RICO Stmt. at 2.)

c. Paylesscigs Enterprise

Plaintiff alleges the Paylesscigs Enterprise consists of Defendant Michael E. Smith. Defendant Michael E. Smith is a resident of the Commonwealth of Virginia. (Am. Compl. ¶ 28.) Plaintiff alleges that Defendant Michael Smith owns or controls the Paylesscigs Enterprise, which operates the Internet websites www.paylesscig.com and www.onsaleweekly.com. (Am. Compl. ¶ 73; Am. RICO Stmt. at 2.) In this capacity, Plaintiff alleges, Defendant Smith directs the Paylesscigs Enterprise to sell cigarettes to New York City residents, to conceal those sales from the New York State tax authorities, and to misrepresent the tax status of the enterprise's sales and its obligations under the Jenkins Act (Am. RICO Stmt. at 2.) Plaintiff alleges the Paylesscigs Enterprise states on its website that:

> We do not provide your information to anyone! Most other cigarette sites don't either, but a few do report sales to state tax offices, so

> find out before you buy, if not you could receive an unexpected tax bill from your state tax office. The only way we will provide any information to anyone is by court order from a court with local jurisdiction.

(Am. Compl. ¶ 53(d).)

Plaintiff alleges Defendant Smith is also the sole proprietor of a retail cigarette outlet known as "Paylesscigs," located in Richmond, Virginia. (Am. Compl. ¶ 28; Smith Decl. ¶ 2.) Defendant Smith has no offices or agents in New York; all documents and employees associated with PaylessCigs are located in Virginia. (Smith Decl. ¶ 4-5).

d. Smokes-Direct Enterprise

Plaintiff alleges the Smokes-Direct Enterprise consists of Defendant Hooray's Inc., Defendant Stephen Knopp, and Defendant Dmitriy Zilberman.

Defendant Hooray's, Inc. ("Hooray's") is a Kentucky corporation with its principal place of business in Louisville, Kentucky. (Am. Compl. ¶ 29; Knopp Decl. ¶ 2, 6.) Plaintiff asserts that Defendant Hooray's, Inc. is an associate of the Smokes-Direct Enterprise. (Am. Compl. ¶ 74.) Hooray's Inc. owns and/or controls Hooray's Discount Depot and also owns or controls the Smokes-Direct Enterprise, which operates Internet websites www.smokes-direct.com and www.cigsonline.com. Hooray's also operates a retail cigarette outlet known as "Smokes-Direct" (a/k/a "Cigsonline"), employing three people in one facility in Louisville, which is part of the Western District of Kentucky. (Knopp Decl. ¶ 6.) Plaintiff alleges that

Hooray's, Inc. directs the Smokes-Direct enterprise to sell cigarettes to New York City residents, to conceal these sales from New York State tax authorities and make misrepresentations to New York City customers regarding the tax status of the enterprise's cigarette sales and its obligations under the Jenkins Act. (Am. RICO Stmt. at 4.).

Defendant Stephen F. Knopp is the President of Defendant Hooray's, and is a resident of Kentucky. (Am. Compl. ¶ 30.) Plaintiff alleges that Stephen Knopp is an associate of the Smokes-Direct Enterprise. (Am. Compl. ¶ 75.) Plaintiff contends that Defendant Knopp directs the Smokes-Direct Enterprise to sell cigarettes to New York City residents and to conceal these sales from New York State tax authorities and make misrepresentations to New York City customers regarding the tax status of the enterprise's cigarette sales. (Am. RICO Stmt. at 4.) Specifically, Plaintiff alleges the Smokes-Direct Enterprise states on its website that it "does not report any sales activity to any state taxing authority and is not required to do so." (Am. Compl. ¶ 53(e).) Plaintiff alleges also that the Smokes-Direct Enterprise's privacy policy promises it "will not divulge your information to any third party with out [sic] either your express consent or as directed by the lawful order of a court of proper jurisdiction." (Am. Compl. ¶ 53(e).)

Defendant Dmitriy Zilberman resides in Kentucky and is an employee or officer of Defendant Hooray's Inc. and the "Administrative Contact" for the Smokes-Direct Enterprise Website. (Am. Compl. ¶ 31; Knopp Decl. ¶ 4.) Plaintiff contends that Defendant Dmitriy Zilberman is an associate of Smokes-Direct Enterprise. (Am. Compl. ¶ 76.) Plaintiff asserts Defendant Dmitriy

Zilberman directs the enterprise to conceal cigarette sales to New York City residents from the New York State taxing authorities and to make misrepresentations to New York City residents concerning the taxable status of the enterprise's cigarette sales and its responsibilities for filing Jenkins Act reports (Am. RICO Stmt. at 4.)

2. Dirtcheap Defendants

Plaintiff alleges that the Dirtcheapcigs Enterprise includes all of the Dirtcheap Defendants, Dirtcheapcigs.com, Fred Teutenberg IV, and Fred Teutenberg V. Defendant Dirtcheapcigs.com, Inc. is a Missouri Corporation with its principal place of business in Paducah, Kentucky. (Am. Compl. ¶ 25; Fred Teutenberg IV Decl. at 1.) Plaintiff alleges that Defendant Dirtcheapcigs.com is an associate of the Dirtcheapcigs Enterprise. (Am. RICO Stmt. at 3.) Plaintiff alleges Dirtcheapcigs.com owns and operates the Dirtcheapcigs.com Enterprise, which maintains a cigarette outlet known as www.Dirtcheapcigs.com. (Am. Compl. ¶ 70.; Am. RICO Stmt. at 3.) Its servers, its call center, and its retail outlet are located in Paducah, Kentucky. (Fred Teutenberg IV Decl. at 1). Defendant Dirtcheapcigs.com has no offices or agents in New York. (Id.) Dirtcheapcigs.com, Inc., however, has taken out print advertisements in New York City to promote the services of the enterprise, although the content of these advertisements is unclear. (Am. RICO Stmt. at 3.)

Plaintiff alleges that Dirtcheapcigs.com directs the Dirtcheapcigs Enterprise to sell cigarettes to New York City residents and to conceal those sales from New York State tax authorities (Am. RICO Stmt. at 3.)

Plaintiff alleges that, at Dirtcheapcigs.com, Inc.'s direction, the Dirtcheapcigs Enterprise also makes misrepresentations to New York City residents regarding the enterprise's sales and concerning the enterprise's responsibility for filing Jenkins Act reports (Am. RICO Stmt. at 3.) Specifically, Plaintiff alleges that the Dirtcheapcigs Enterprise states on its website that: "It is our researched legal opinion that we are not required to furnish [customer names and addresses to government authorities]. To date we have never furnished such information. We are the last refuge of the persecuted smoker." (Am. Compl. ¶ 53 (c).)

Defendant Fred Teutenberg IV resides in the Eastern District of Missouri and is President of Defendant Dirtcheapcigs.com, Inc. (Am. Compl. ¶ 26; Fred Teutenberg IV Decl. at 2.) Defendant Fred Teutenberg V is a resident of the Eastern District of Missouri and is a Vice President of Defendant Dirtcheap.com, Inc. (Am. Compl. ¶ 27; Am. RICO Stmt. at 3.) Plaintiff alleges that Defendants Fred Teutenberg IV and Fred Teutenberg V are associates of the Dirtcheapcigs Enterprise. (Am. Compl. ¶¶ 71-72.) Plaintiff alleges that, as associates of the Dirtcheap Enterprise, both Fred Teutenberg IV and Fred Teutenberg V direct the enterprise to make cigarette sales to New York City residents and conceal those sales from the New York State tax authorities. Further, at the Teutenbergs' direction, the Dirtcheapcigs Enterprise makes the aforementioned misrepresentations to New York City residents concerning the tax status of the enterprise's sales and concerning the enterprise's responsibility for filing Jenkins Act reports. (Am. RICO Stmt. at 3.)

3. Bulkcigs Defendants

a. Bulkcigs Enterprise

Plaintiff alleges that the Bulkcigs Enterprise includes S4L Distributing, Inc. and William C. Baker III. Defendant S4L Distributing, Inc. ("S4L Inc.") is a Virginia corporation with its principal place of business in the Western District of Virginia. (Am. Compl. ¶ 32; Baker Decl. at 1.) Plaintiff alleges that Defendant S4L Distributing is an associate of the Bulkcigs Enterprise and in fact, owns and/or controls the Bulkcigs Enterprise. The Bulkcigs Enterprise operates the Internet websites www.bulkcigs.com and www.S4L.com. (Am. RICO Stmt. at 4.) Plaintiff further alleges that S4L directs the Bulkcigs Enterprise to sell cigarettes to New York City residents and conceal these sales from New York State tax authorities and make misrepresentations to New York City residents about the tax status of the cigarettes sold and about the enterprise's obligations under the Jenkins Act. (Am. RICO Stmt. at 4-5.) S4L, Inc. has no offices or representatives in New York. (Baker Decl. at 1.)

Defendant William C. Baker III is a citizen of Virginia, residing in the Western District of Virginia. (Baker Decl. at 1.) Plaintiff alleges that Defendant Baker is an employee or officer of Defendant S4L, Inc. and is also an associate of Bulkcigs Enterprise. (Am. Compl. ¶¶ 33, 78.) Plaintiff asserts that Defendant Baker directs the enterprise to sell cigarettes to residents of New York City, to conceal the sales from New York State tax authorities, and to make misrepresentations to New York City residents about the tax status of the cigarettes sold and about the

Bulkcigs Enterprise's obligations under the Jenkins Act (Am. RICO Stmt. at 5.)

b. DiscountTobacco Enterprise

Plaintiff alleges that the DiscountTobacco Enterprise is comprised of Double B Distributing and William J. Bevins. (Am. RICO Stmt. at 5.)

Defendant Double B Distributing d/b/a Discount Tobacco Store ("Double B") is a Virginia business with its principal place of business in the Western District of Virginia. (Am. Compl. ¶ 34; Bevins Decl. at 1.) Plaintiff alleges that Double B owns or controls the Discount Tobacco Enterprise, which operates the website www.discounttobaccostore.com. (Am. Compl. ¶ 34.) In this capacity, Plaintiff claims Double B directs the Discount Tobacco Enterprise to sell cigarettes to residents of New York City and to conceal the sales from New York State tax authorities (Am. RICO Stmt. at 5.) Plaintiff also alleges Defendant Double B directs the Discount Tobacco Enterprise to make misrepresentations to New York City residents about the tax status of the cigarettes sold and about the enterprise's obligations under the Jenkins Act. (Am. RICO Stmt. at 5.) Double B has no offices or representatives in New York. (Bevins Decl. at 1.)

Defendant William J. Bevins Jr. resides in the Western District of Virginia and is an owner or officer of Defendant Double B. (Am. Compl. ¶ 35; Bevins Decl. at 1.) Plaintiff alleges that Defendant William J. Bevins Jr. is an associate of the Discount Tobacco Enterprise and in fact, owns and/or controls the enterprise. (Am. Compl. ¶ 79.) Plaintiff alleges Bevins directs the enterprise to sell cigarettes to New York

City residents and make misrepresentations about the tax status of the cigarettes sold and about the Discount Tobacco enterprise's obligations under the Jenkins Act (Am. RICO Stmt. at 5.)

II. DISCUSSION

A. Standard of Review

In deciding a Fed.R.Civ.P. 12(b)(6) motion, the Court must read the complaint generously, accepting as true the factual allegations in the complaint and drawing all inferences in favor of the pleader. *Bolt Elec., Inc. v. City of New* York, 53 F.3d 465, 469 (2d Cir. 1995); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). The Court will grant such a motion only if, after viewing plaintiff's allegations in a most favorable light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Walker v. City of New* York, 974 F.2d 293, 298 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 113 S. Ct. 1387, 122 L. Ed. 2d 762 (1993).

While a court considering a Rule 12(b)(6) motion to dismiss for failure to state a claim is limited to the facts stated in the complaint, the complaint includes any written instrument attached as an exhibit and any statements or documents incorporated by reference into the complaint. *See Paulemon v. Tobin*, 30 F.3d 307, 308-09 (2d Cir. 1994); *Rombach v. Chang*, 355 F.3d 164, 169 (2d Cir. 2004). In addition, the Court may consider the factual allegations in Plaintiff's RICO Statement as a supplement to the complaint. *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir.

1992); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 515 (S.D.N.Y. 1997). Courts may also consider "documents either in plaintiff's possession or of which plaintiff [] had knowledge and relied on in bringing suit." *Brass v. American Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

It is well established under Fed.R.Civ.P 9(b) that in all averments of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." This heightened pleading requirement is designed to (1) provide a Defendant with notice to enable her to prepare a defense; (2) protect a Defendant against harm to her reputation or goodwill; and (3) deter strike suits. *See DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). Because Rule 9(b) requires a Plaintiff to state on the record the specific nature of the fraud, allegations of fraud may not be based upon information and belief. *See DiVittorio*, 822 F.2d at 1247. However, when the facts underlying the fraud are peculiarly within the opposing party's knowledge, a Complaint may be based upon information and belief. *Id.* But even in those circumstances, the plaintiff still bears the burden of alleging the facts upon which his or her belief is founded. *Id.* at 1248.

All of the Defendants argue that the Complaint fails to identify the fraudulent statements or circumstances with particularity as required by Fed.R.Civ.P 9(b). (Multistate 12(b)(6) Mem. at 16; Hemi Group Mem. at 22; Dirtcheap Mem. at 17.)

To fulfill Rule 9(b)'s particularity requirements, a Complaint must specify the time, place, speaker, and content of the alleged misrepresentation. *DiVittorio*,

822 F.2d at 1247 (citing *Luce v. Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986)). While scienter may be averred generally, "plaintiffs are still required to plead the factual basis which gives rise to a strong inference of fraudulent intent." *Fischer v. Tynan*, No. 90-7587, 1993 U.S. Dist. LEXIS 8224, *5, 1993 WL 213025 at *2 (S.D.N.Y. June 16, 1993) (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). This means that, "a complaint must adequately specify the statements it claims were false and misleading, give particulars as to the respect in which Plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 38 (S.D.N.Y. 1992) (quoting *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)), *aff'd*, 23 F.3d 398 (2d Cir. 1994); see also *DiVittorio*, 822 F.2d at 1247; *Keenan v. D.H. Blair & Co., Inc.*, 838 F. Supp. 82, 86 (S.D.N.Y. 1993); *Kubin v.* Miller, 801 F. Supp. 1101, 1117 (S.D.N.Y. 1992).

Here, Plaintiff has shown misrepresentations made by Defendants on their websites and omissions made by the Defendants, as well as where and when they occurred. Specifically, Plaintiff has shown that the following Defendants allegedly made misrepresentations on their websites, which have occurred continuously since the websites were placed online: Dirtcheapcig.com, Fred Teutenberg IV, Fred Teutenberg V, Hooray's, Stephen K. Knopp, Hemi Group, Kai Gachupin. (Am. RICO Stmt. at 8.) As discussed later, although Plaintiff has shown that statements were made on the following Defendants' websites, it is not clear that the statements made were misrepresentations: Cyco.net, Richard A. Urrea, Daniel R. Urrea, Michael E. Smith, and S4L

Distributing, Inc. Furthermore, Plaintiff does not allege *any* statements were made on websites by the following Defendants: Double B Distributing and William J. Bevins Jr. However, because of the nature of the claim, that Defendants' actions of *not* filing Jenkins Act reports caused the City harm, information regarding sales to New York City cigarette consumers, "lies peculiarly within the opposing parties' knowledge." *DiVittorio*, 822 F.2d at 1248. Plaintiff has shown, through its communications with the New York State tax authorities, that none of the Defendants have ever filed Jenkins Act reports, which, as discussed later, may be construed as a misrepresentation resulting in fraud. (Am. RICO Stmt. at 8.) Therefore, reading the Complaint and the RICO Statement generously and drawing all inferences in favor of the pleader, as a court must do when deciding a Rule 9(b) motion, *Cosmas v.* Hassett, 886 F.2d 8, 11 (2d Cir. 1989), the Court finds that Plaintiff has successfully pled fraudulent intent and the content of the alleged omissions with sufficient particularity.

B. Personal Jurisdiction

Only Defendants Fred Teutenberg IV and Fred Teutenberg V contest personal jurisdiction in New York. Defendants argue that as employees of Dirtcheapcigs.com they are separate and distinct from the corporation, and while personal jurisdiction over the corporation may be proper in New York, the Court lacks personal jurisdiction over the Teutenbergs as individual defendants. (Defs.' Mem. of Law at 24.) The Teutenbergs claim they do not reside in New York, and do not have any real property, offices or agents in New York. (Teutenberg IV Decl. ¶ 8-9; Teutenberg V Decl. ¶¶ 3,6.) They contend that they have not been to New

York on business, and have not made any contract in New York related to the Dirtcheapcigs.com, and have not entered into a contract to supply goods or services in New York. (Teutenberg IV Decl. ¶¶ 11-14; Teutenberg V Decl. ¶¶ 4.) The Teutenbergs state that they do not sell or transfer cigarettes in interstate commerce. (Teutenberg IV Decl. ¶ 14; Teutenberg V Decl. ¶ 14.)

On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2), plaintiff bears the burden of establishing the court's jurisdiction over defendants. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). However, if a forum's personal jurisdiction over a defendant is questioned before discovery has commenced, in order to defeat the motion, Plaintiff only has to establish, *prima facie*, that personal jurisdiction is proper based on information in the complaint as well as supporting documentation. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). The court must assume all the factual allegations in the complaint are true, and resolve all doubts in plaintiff's favor "notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993).

Exercise of personal jurisdiction for violation of civil RICO cases is dictated by 18 U.S.C. § 1965. The Second Circuit interprets this statute to allow the federal courts a more expansive jurisdictional reach than that permitted by Fed.R.Civ.P. 4(k).[5] In general

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[5] Rule 4(k) provides, in relevant part: (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over

federal courts must guarantee that personal jurisdiction is in accordance with both the long-arm statute of the state in which the federal court is located and the Constitution.

The Due Process Clause of the Fourteenth Amendment permits a state to exercise personal jurisdiction over a non-resident defendant with whom it has

> certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" In determining whether minimum contacts exist, the court considers "the relationship among the defendant, the forum, and the litigation." To establish the minimum contacts necessary to satisfy "specific" jurisdiction, the [plaintiff] first must show that [his] claim arises out of or relates to [defendant's] contacts with [the forum state]. The [plaintiff] must also show that [the defendant] "purposefully availed" [himself] of the privilege of doing business in [the forum state] and that [the defendant] could foresee being "haled into court" there.

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the person of a defendant (1) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, 'with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Chew v. Dietrich, 143 F.3d 24, 28 (2d Circuit 1988)(citations omitted).

To establish minimum contacts under civil RICO, however, Plaintiff need only prove one of four factors listed in 18 U.S.C. § 1965 (a), *inter alia*, which provides that "any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 71 (2d Cir. 1998).

Moreover, "a civil RICO action may be brought in district court where personal jurisdiction based on minimum contacts is established as to at least one defendant." *PT United Can Co.*, 138 F.3d 65, 71. The City has adequately met its burden of establishing, *prima facie*, that the Teutenbergs "transact their affairs in New York, thereby rendering them amenable to personal jurisdiction here. The legislative history of section 1965(a) reveals that it was patterned after the antitrust statutes. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), *reprinted in* 2 U.S. Code Cong. & Adm. News 4007, 4034 (1970). Thus, "transacts his affairs" language of Section 1965(a) has been held to be synonymous with the "transacts business" language of section 12 of the Clayton Act, 15 U.S.C. § 22. *King v. Vesco*, 342 F. Supp. 120, 124 (N.D. Cal. 1972). Moreover, "the test for transacting business for venue purposes under the antitrust laws is coextensive with the test for jurisdiction under New York CPLR § 302". *Agra Chemical Distributing Co., Inc. v. Marion Laboratories, Inc.*, 523 F. Supp. 699, 702 (W.D.N.Y.

1981). *Bulk Oil (USA), Inc. v. Sun Oil Trading Co.*, 584 F. Supp. 36, 39-40 (S.D.N.Y. 1983). The Second Circuit has read NY CPLR § 302(a)(1) to allow a corporation to act as an agent for individual defendants. *See Retail Software Services v. Lashlee*, 854 F.2d 18, 22 (2d Cir. 1988)(citing *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 527 N.Y.S2d 195, 522 N.E.2d 40 (1988)).

"Plaintiff need not establish a formal agency relationship between defendants and [the corporation]. He need only convince the court that [the corporation] engaged in purposeful activities in this State in relation to [its] transaction for the benefit of and with the knowledge and consent of the [non-domiciliary] defendants and that they exercised some control over [the corporation] in this matter." *Id.*

Personal jurisdiction over the Teutenbergs comports with the requirements of New York CPLR § 302 (a) (1) because Dirtcheapcigs.com engaged in purposeful activities in New York vis-a-vis its interactive web-site, *Bensusan Restaurant Corp. v. King* 126 F.3d 25 (2d Cir. 1997); *State of Washington, Dept. of Revenue v. www.Dirtcheapcig.com*, 260 F. Supp. 2d 1048,[6] with the consent and knowledge of its President and Vice President, the Teutenbergs. Plaintiff alleges that the Teutenbergs (1) directed Dirtcheap.com to sell cigarettes to New York City residents, (2) to conceal those sales from New York state tax authorities, and (3) to make

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[6] In that case, www.Dirtcheapcig.com a U.S. District Court in Washington found personal jurisdiction proper because the corporation had purposefully availed itself of the forum.

misrepresentations regarding the tax status of their cigarette sales and their responsibilities under the Jenkins Act. (Am. RICO Stmt. at 3.) These allegations are sufficient to establish *prima facie* that the Teutenbergs transact their affairs in New York and thus, are amenable to personal jurisdiction in New York.[7]

Having established that the Teutenbergs have minimum contacts with New York, the court must also consider "whether the assertion of jurisdiction 'comports with traditional notions of fair play and substantial justice--that is, whether it is reasonable under the circumstances of a particular case.' *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.),*cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)); *see also Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994).

The Court is satisfied that Plaintiff's allegations concerning the Teutenbergs' knowledge and control of Dirtcheapcigs.com's New York transactions amount to

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[7] To determine whether Defendants "may be found" in New York, the Court also looks by analogy to another federal statute where personal jurisdiction and venue are inextricably linked: 28 U.S.C. § 1400(a), the Copyright Act. A Defendant "may be found" in any district in which he/she is amendable to personal jurisdiction. *Haaretz Daily Newspapers, Ltd. v. Chani Inc.*, No. 98-2878, 1999 U.S. Dist. LEXIS 15581 (S.D.N.Y. Oct. 6, 1999); *See also Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 215 (S.D.N.Y. 1995); *Pfaff v. Denver Art Museum*, 94-9271, 1995 U.S. Dist. LEXIS 8573 (S.D.N.Y. June 22, 1995).

adequate notice that they could be reasonably haled into court in New York. If, as Plaintiff states, the Teutenbergs planned and executed a scheme to sell cigarettes to New York residents, conceal these sales from New York State tax authorities and make misrepresentations about the tax status of their cigarette sales to New York residents and their tax liability under the Jenkins Act, (Am. RICO Stmt. at 3), then it is reasonable that the Teutenbergs be subject to the jurisdiction of New York's courts.

Because the Teutenbergs transact their affairs in New York, they have established the requisite minimum contacts with New York necessary to satisfy both § 1965 (a), *PT Can Co. Ltd.*, 138 F.3d at 71, and the Due Process clause of the Fourteenth Amendment of the Constitution.

C. Venue

Multistate Defendants, www.Dirtcheapcigs.com, Fred Teutenberg V, Fred Teutenberg IV, S4L Distributing Inc., William C. Baker, Double B Distributing and William J. Bevins move to dismiss for improper venue pursuant to Fed.R.Civ.P. 12(b)(3) and 28 U.S.C. § 1406(a).

Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1404(a), 1406(a) permit the Court to dismiss a claim where venue is improper.[8]

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[8] 28 U.S.C. § 1404 (a) states: The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district in which it could have been brought.

The requirement of proper venue "serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred." *Leon C. Baker, P.C. v. Bennett*, 942 F. Supp. 171, 175 (S.D.N.Y. 1996). When venue is challenged, Plaintiff "bears the burden of demonstrating that a substantial part of the events or omissions giving rise to the claim occurred in this district." *G.F.C. Fashions v. Goody's Family Clothing*, No. 97-0730, 1998 U.S. Dist. LEXIS 1989, *5, 1998 WL 78292 at *2 (S.D.N.Y. Feb. 24, 1998).

Venue may be proper although a forum is not the only possible forum. *Fisher v. Hopkins*, No. 02-7077, 2003 U.S. Dist. LEXIS 307 (S.D.N.Y. Jan. 9, 2003). Venue may be proper even if a greater part of the events giving rise to a claim happened in another forum. *Id.* 2003 U.S. Dist. LEXIS 307, at 7; *Astor Holdings, Inc. v. Roski*, No. 011905, 2002 U.S. Dist. LEXIS 758, 2002 WL 72936, at *8 (S.D.N.Y. Jan. 17, 2002). *See also Rothstein v. Carriere*, 41 F. Supp. 2d 381, 387 (E.D.N.Y. 1999), citing *Neufeld v. Neufeld*, 910 F. Supp. 977, 986 (S.D.N.Y. 1996).

However, venue must be properly established over each defendant for each cause of action plaintiff pleads. *Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C.*, 927 F. Supp. 731, 736 (S.D.N.Y. 1996); Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction 2d Section 3808. In this case, Plaintiff has asserted a federal claim under the RICO statute, 18 U.S.C. § 1961 et seq., and a pendent claim pursuant to New York State's General

Business Law § 349 as well as a common law fraud claim.

In civil RICO cases, venue is governed by 18 U.S.C. § 1965(a) and (b). "The RICO venue provision is supplemental to the general federal venue provision found in 28 U.S.C. § 1391." *Shuman v. Computer Associates International, Inc.*, 762 F. Supp. 114, 116 (E.D. Pa. 1991); *accord*, *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285, 1291 (E.D. Wis. 1985); *see also*, 1A *Moore's Federal Practice*, Venue, ¶ 0.340[7]. This means Plaintiff may properly lay venue in accordance with *either* 18 U.S.C. 1965 or 28 U.S.C. 1391. As previously stated, Congress intended the civil RICO venue provisions to be a liberalization to the federal venue statute 28 U.S.C. § 1391. *See* 1970 House Report No. 1549, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 (noting that § 1965 "contains broad provisions regarding venue and process, which are modeled on present antitrust legislation"); *See also* 116 Cong. Rec. H35196 (daily ed. Oct. 6, 1970)(remarks of Rep. Emanuel Celler that "provision is made for nationwide venue and service of process").

Defendants opposing venue in the Southern District of New York claim they do not reside, have agents, or transact their affairs in the Southern District of New York. Furthermore, they argue they cannot be found here and deny that a substantial part of the acts and/or omissions giving rise to Plaintiff's claims occurred in the Southern District of New York.

Although the Second Circuit has not yet clearly enunciated its position concerning the scope of civil RICO's venue provision, it is the policy in this Circuit to conflate personal jurisdiction and venue by reading

the RICO venue provision to permit adjudication in any district where minimum contacts are established. *PT United Can Co. Ltd.*, 138 F.3d 65, at 71; *Gates v. Wilkinson*, 2003 U.S. Dist. LEXIS 9417, 01-3145, 2003 WL 21297296 *1 (S.D.N.Y. June 4, 2003)(finding venue improper because Defendants failed to meet either of the four statutory factors provided for in section 1965 (a)). Accordingly, for the same reasons that personal jurisdiction in New York is proper over Defendants, so too is venue over Plaintiff's civil RICO claim.

2. Venue for NYS *General Business Law Section 349* and Common Law Fraud

Plaintiff must also establish that venue is proper for its pendent state law claims brought under New York State's General Business Law § 349. The doctrine of pendent venue permits the Court in its discretion to find venue where it arises from the same nucleus of operative facts as a "properly venued" federal claim. *See Hudson Venture Partners, L.P. v. Patriot Aviation Group, Inc.*, 1999 U.S. Dist. LEXIS 1518, No. 98-4132, 1999 WL 76803, at *5 (S.D.N.Y. Feb. 17, 1999); *Banfield v. UHS Home Attendants*, 1997 U.S. Dist. LEXIS 8778, No. 96-4850, 1997 WL 342422, at *1 (S.D.N.Y. June 23, 1997). "Venue for the state law claim is clearly a function of venue for the federal claim and, in the court's discretion, pendent venue may be found over the state law claim to enable adjudication of that claim together with the federal claim." *Garrel v. NYLCare Health Plans, Inc.*, 1999 U.S. Dist. LEXIS 9778, No. 98-9077, 1999 WL 459925, *4 (S.D.N.Y. June 29, 1999).

In determining whether pendent venue is proper, the Court must consider "judicial economy,

convenience to the parties and the court system, avoidance of piecemeal litigation and fairness to the litigants." *Rodriguez v. Chandler*, 641 F. Supp. 1292, 1302 (S.D.N.Y. 1986). Because Plaintiff's state law claim is based on the same set of operative facts as its RICO claim, the evidence and witnesses will be the same for both claims. *See University Sav. Ass'n v. Bank of New Haven*, 765 F. Supp. 35 (D.Conn. 1991)(finding that where state law claims asserted against defendant in RICO action were properly before the court pursuant to doctrine of pendent jurisdiction because the claims all derived from common nucleus of operative facts, and it was in the interest of judicial economy to hear all related claims and try the case at one time)). Therefore, it serves the interests of judicial efficiency to hear Plaintiff's state law claims together with its claims under civil RICO.

D. Transfer

Multistate Defendants, S4L Distributing, William C. Baker, Double B Distributing, and William J. Bevins move to transfer venue pursuant to 28 U.S.C. §§ 1406(a) and 1404 (a). The Dirtcheapcigs and S4L Defendants' motions for transfer pursuant to 28 U.S.C. 1406(a) are mooted. Because venue is proper in the Southern District of New York, the motions to transfer pursuant to 1404(a) are moot. *Fisher v. Hopkins*, 2003 U.S. Dist. LEXIS 307, at *9 (section 1406(a) does not apply when venue is correct).

Moreover, "a plaintiff's choice of forum is accorded significant weight" in a transfer motion. Indeed, "the determination whether to grant a change of venue requires a balancing of conveniences, which is left to the sound discretion of the court." *Filmline (Cross-*

Country) Productions, Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989). In deciding a motion to transfer, the Court should consider (1) where the events at issue took place, (2) the convenience of the parties and material witnesses, (3) the relative ease of access to sources of proof, (4) the weight accorded to plaintiff's choice of forum, (5) the forum's familiarity with the governing law, (6) trial efficiency, and (8) the interest of justice. *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 691-92 (S.D.N.Y. 1994).

The Court is satisfied that these factors are sufficiently met in the instant case. In particular, transfer is inappropriate because neither trial efficiency nor the interests of justice are served by transferring the case. *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 619 (2d Cir. 1968) ("There is a strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided."). Were this Court to order transfer, Plaintiff would be forced to litigate this action in four, perhaps five, judicial districts across the country. The Court will not engage in such a waste of resources. Accordingly, Defendants' motions to transfer are DENIED.

E. Federal RICO Claims

Although primarily a criminal statute, Congress explicitly created a private right of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964-1968. "Any person injured in his business or property by reason of a violation of

section 1962" may invoke the civil RICO remedies. 18 U.S.C. § 1964(c). If the plaintiff proves its injury resulted from a violation of § 1962, the plaintiff is entitled to "recover threefold the damages he sustained and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).

Courts have found that an alleged RICO violation must be reviewed carefully and "with appreciation of the extreme sanctions it provides, so that actions traditionally brought in state courts do not gain access to treble damages and attorney's fees in federal courts simply because they are cast in terms of RICO violations." *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 1001 (E.D.N.Y. 1995); *see also Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) ("[Civil RICO] is an unusually potent weapon--the litigation equivalent of a thermonuclear device . . . ."); *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 397 (S.D.N.Y. 2000) (stating that "this Court looks with particular scrutiny at Civil RICO claims to ensure that the Statute is used for the purpose intended by Congress"). This Court, therefore, reviews the present Plaintiff's civil RICO pleadings with particular scrutiny.

Plaintiff alleges that various Defendants conducted the management and operation of the affairs of an enterprise, directly or indirectly, through a pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961 (1)(B), 1961 (5), and 1962 (c) and (d), in violation of 18 U.S.C. § 1962 (c) and (d), consisting of continuous and multiple instances of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. (Am. Compl. ¶¶ 16, 64, 80, 90.)

The Multistate Defendants, the Hemi Group Defendants, and the Dirtcheap Defendants move to dismiss, arguing that the City does not have standing to bring a Civil RICO claim. The Dirtcheap Defendants also argue that the Complaint fails to state a civil RICO claim under 18 U.S.C. § 1962(d), which is the conspiracy provision of RICO. (Dirtcheap Mem. at 11.)

1. Standing Under RICO

To satisfy the standing requirement under § 1964(c) of the RICO statute, the section relevant here, a plaintiff must demonstrate, (1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the defendant's violation. *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir.2003) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990)); *see also Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003) (stating that the third element of standing, that of causation, "is satisfied if the defendant's injurious conduct is both the factual and the proximate cause of the injury alleged." (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 (2d Cir. 2003)).

a. Violation of § 1962

As stated above, the first element needed to prove RICO standing is a violation of § 1962. Section 1962(c) of the RICO Act, which Plaintiff here alleges was violated, provides in part that, "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

racketeering activity...." *See also Int'l Bhd. of Teamsters v. Carey*, 297 F. Supp. 2d 706, 713 (2d Cir. 2004) (holding that the elements necessary to establish a violation of 1962(c) are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481-82, 105 S. Ct. 3275, 3277, 87 L. Ed. 2d 346, 349 (1985) and *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir. 1994)). Here, the Court focuses on the elements of "enterprise" and "racketeering activity" to determine if a violation of *§ 1962* has been sufficiently pled.

i. Person Distinct from Enterprise

The Defendants argue the City has not alleged individuals distinct from the enterprise, and therefore that the Complaint fails to state a civil RICO claim. (Multistate 12(b)(6) Mem. at 5; Hemi Group Mem. at 5; Dirtcheap Mem. at 9.)

For offenses under § 1962(c), it is well settled that the alleged RICO person must be distinct from the alleged RICO enterprise. *De Falco v. Bernas*, 244 F.3d 286, 307 (2d Cir. 2001) (citing cases). "Because § 1962(c) speaks separately of a RICO 'person' acting on or conducting the affairs of the 'enterprise,' which clearly envisions two entities, a plaintiff must also comply with the rule that the RICO person and enterprise referred to must be distinct." *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 546 (S.D.N.Y. 2002) (citing *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) and *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994) (quotations omitted).

The RICO statute defines "enterprise" as including, "any individual, partnership, corporation, association, or other legal entity." 18 U.S.C. § 1961(4). An association-in-fact enterprise is defined in § 1961(4) as "any union or group of individuals associated in fact although not a legal entity." This definition has been expounded by case law, as requiring "a group of persons associated together for a common purpose of engaging in a course of conduct, the existence of which is proven by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir. 2004) (quoting *United States v. Turkette*, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) (internal quotations omitted)). For an association of individuals to constitute an enterprise, the Second Circuit also requires that the individuals "share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Id.* at 173 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993)). Such an association of "individuals" may include corporations. *See United States v. Huber*, 603 F.2d 387 (2d Cir. 1979) (stating that a group of corporations may comprise an association-in-fact enterprise).

Here, the Plaintiff alleges that the 16 Defendants (who are both corporations and natural persons) are associates of seven named Internet cigarette enterprises. (Am. Compl. ¶¶ 62-79.) It further alleges that the enterprises are comprised of individuals with a common purpose, a continuity of structure and personnel, and a consensual decision-making structure that is used to engage in conduct that is both legal and

illegal. (Am. Compl. ¶¶ 62-63.) Plaintiff also states in its RICO Statement that "No individual or business entity alleged to be a liable person herein is the same entity as the enterprise." (Am. RICO Stmt. at 12.)

The Dirtcheap Defendants argue that the Plaintiff's identification of various enterprises fails because it "cannot identify any 'enterprise' apart from the Defendants themselves." (Dirtcheap Mem. at 9.) The Dirtcheap Defendants further argue that each enterprise alleged by the Plaintiff is comprised of a corporation and its officers and employees, which is fatal to its claims. (*Id.*) The Multistate Defendants argue along similar lines, specifying that officers and employees of a business are not separate persons from their corporation and regularly carrying out their business does not constitute a separate enterprise. (Hemi Group Mem. at 5-6; Multistate 12(b)(6) Mem. at 6-7.) In its opposition, Plaintiff argues that it establishes RICO's distinctness requirement under the rubric of *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166, 121 S. Ct. 2087, 2092, 150 L. Ed. 2d 198, 206 (2001).

In *Kushner*, the Supreme Court considered whether a 1962(c) claim could be brought against Don King, who was the president and sole shareholder of the closely held corporation, Don King Productions, which also was a defendant. 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198. The Supreme Court stated that to establish liability under section 1962(c), "one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." 533 at 161, 121 S. Ct. at 2090, 150 L. Ed. at 203. The Court found that the person, Don King, was distinct from the

corporation, which was the RICO enterprise, because the corporation was a "legally different entity with different rights and responsibilities." 533 at 163, 121 S. Ct. at 2091, 150 L. Ed. 204. The Supreme Court held that where a corporate employee acts within the scope of his or her authority to conduct the company's affairs in a way that violates RICO, the corporate employee may be considered distinct from the corporation. 533 at 164, 121 S. Ct. at 2091, 150 L. Ed. at 205. Plaintiff's reliance on *Kushner* is misplaced. The Supreme Court was careful to differentiate the facts in Kushner, where the defendant Don King, who was also an employee, was the "person" and the defendant corporation was the RICO "enterprise," from other cases, "which involved quite different circumstances which are not presented here." 533 at 164, 121 S. Ct. at 2091, 150 L. Ed. at 205. In particular, the Court cited *Riverwoods Chappaqua Corp v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994) as having different circumstances, where the "person" was the corporation and the "enterprise" was the corporation, along with its employees and agents. *Id.*

The plaintiffs in *Riverwoods* alleged that the defendant bank had coerced them through extortion and mail fraud, into restructuring loan agreements, in violation of RICO. 30 F.3d at 341. In one count, the plaintiff alleged that Marine Midland and two of its loan officers comprised an association-in-fact enterprise, known as the "Restructuring Group." *Id.* The Court of Appeals allowed that a corporate entity could be both a defendant and an enterprise, where it "associates with others to form an enterprise that is sufficiently distinct from itself," and where "there is only a partial overlap between the RICO person and

the RICO enterprise." 30 F.3d at 344. The court continued, "Nevertheless, by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented." *Id.* at 344. The court found that there was not enough evidence to show that the Restructuring Group was distinct from the defendant, Marine Midland. *Id.* at 343. The court said, "Thus, where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Id.* at 344.

The court in *Riverwoods* analogized the facts of that case with the facts in *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.) (per curiam), *cert denied*, 483 U.S. 1032, 107 S. Ct. 3276, 97 L. Ed. 2d 780 (1987). In *Atkinson*, the plaintiffs alleged that the defendant bank had violated RICO, by committing mail fraud when it sent the plaintiffs fraudulent loan statements, in excess of the rate agreed on by the parties. 808 F.2d at 439. The alleged enterprise was an association-in-fact comprised of the defendant bank, its holding company, and three bank employees. 808 F.2d at 440-41. The Fifth Circuit held that there was no evidence that the bank, its holding company, and its employees, were associated in any manner apart from the bank's activities: "Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank." *Id.* at 441. In particular, the Fifth Circuit pointed out that the mailing of the false loan statements was an activity of the bank and "there is no evidence of any other activity on the part of the

alleged enterprise." *Id.* After discussing *Atkinson*, the Second Circuit in *Riverwoods* said, "Similarly, in this case, appellants cannot seriously contend that the actions of the Restructuring Group were anything other than the activities of Marine Midland employees carrying out the business of that bank." 30 F.3d at 344.

In *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), the Second Circuit clarified the difference between its holdings in *Riverwoods and Cullen v. Margiotta*, 811 F.2d 698, 729-30 (2d Cir. 1987), where it had said, "we see no reason why a single entity could not be both the RICO 'person' and one of a number of members of the RICO 'enterprise.'" In *Discon*, the Second Circuit said that "*Riverwoods* involved only a single corporate entity that was associated with its employees, whereas *Cullen* involved three legally separate entities that could be differentiated from the enterprise-group. Moreover, in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation and therefore, it would have been especially inappropriate to hold that they were 'distinct' from the enterprise." *Id.* at 1063-64 .

Here, Plaintiff has alleged seven "Internet Cigarette Enterprises,"[9] each of which Plaintiff alleges "sells cigarettes over the Internet, primarily to residents of states with high cigarette taxes." (Am. Compl ¶ 85; Am. RICO Stmt. at 9.) Furthermore, Plaintiff alleges that each enterprise "advertises,

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[9] The "Aabakismokes Enterprise," the "Cigarettespecials Enterprise," the "Dirtcheapcigs Enterprise," the "Paylesscigs Enterprise," the "Smokes-Direct Enterprise," the "Bulkcigs Enterprise," and the "DiscountTobacco Enterprise. (Am. Compl. ¶ 62.)

usually over the Internet, but also by traditional means, the availability of cigarettes at the low prices that prevail in the enterprise's home state." (Am. RICO Stmt. at 9.) And furthermore, "the enterprises are responsible for reporting the purchases to the purchasers' state tax authorities." (*Id.* at 10.) Plaintiff alleges that a predicate act of mail or wire fraud occurs "when the enterprise is directed to conceal cigarette sales from state tax authorities by failing to file Jenkins Act reports or directed to effect sales by means of misrepresentations." (*Id.* at 11.) However, the "persons" associated with the enterprises--those who "direct" the enterprises to conduct these activities--are none other than the 16 named Defendant corporations and their officers and employees.[10] (Am. RICO Stmt. 1-5.) Plaintiff has not shown that the persons who conduct the affairs of the enterprises and the enterprises themselves are distinct. Instead, all the entities that comprise the enterprise are Defendants.

Decisions decided in this district since *Kushner* are in keeping with this holding, even those that have found the distinctness element has been met. For example, *Panix Promotions, Ltd. v. Lewis*, involved a

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[10] Defendants Cyco.net, Richard Urrea, and Daniel Urrea comprise the Aabakismokes Enterprise; Defendants Hemi Group, LLC and Kai Gachupin comprise the Cigarettespecials Enterprise; Defendants Dirtcheapcigs.com, Fred Teutenberg IV, and Fred Teutenberg V comprise the Dirtcheapcigs Enterprise; Defendant Michael E. Smith comprises Paylesscigs Enterprise; Defendants Hooray's, Stephen Knopp, and Dmitriy Zilberman comprise the Smokes-Direct Enterprise; Defendants S4L Distributing, Inc. and William C. Baker III comprise the Bulkcigs Enterprise; and Defendants Double B Distributing and William J. Bevins comprise the Discount Tobacco Enterprise. (Am. RICO Stmt. at 1-5.)

defendant boxer who counterclaimed against his promoters for defrauding him in various ways, in violation of RICO. No. 01-2709, 2002 U.S. Dist. LEXIS 784 (S.D.N.Y. Jan. 17, 2002). The district court found that the three enterprises alleged were proper, but it specifically stated that neither the Panix corporation that comprised "the Panix Enterprise," nor the Panix U.S. corporation that comprised "the Panix U.S. Enterprise," were liable as a "person." *Id.* 2002 U.S. Dist. LEXIS 784, at *19-20. The court said, "The Second Circuit has held that such a construct, where a division or subsidiary of an 'enterprise' is alleged to also constitute a distinct 'person,' cannot constitute a RICO claim." *Id.* 2002 U.S. Dist. LEXIS 784 at *19 (citing *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d. Cir. 1994)).

The district court in *Sony Music Entm't Inc. v. Robison*, No. 01-6415, 2002 U.S. Dist. LEXIS 3100 (S.D.N.Y. Feb. 26, 2002) found that where Sony, who was the plaintiff-counterclaim defendant, was the RICO person, it could also be considered part of the enterprise, even though Sony was part-owner of an entity identified as part of the enterprise. The court found this was possible, "because Sony does not constitute the entire enterprise." *Id.* 2002 U.S. Dist. LEXIS 3100 at *16. In *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521 (S.D.N.Y. 2002), the court found the distinctness element met in one count where the sole defendant was a law firm that was charged with conducting an association-in-fact enterprise, the "B&B Enterprise," which was comprised of not only the law firm, but various local counsel, doctors and/or unions. *Id.* at 546. It also found distinctness in another count, where two lawyers were alleged to be the "persons" who directed the activities of the B&B

Enterprise and the law firm enterprise. The court found under *Kushner*, that the two lawyers were separate and distinct legal entities from their law firm. *Id.* at 547. Like *Kushner*, however, the person and the enterprise alleged were different.

Stolow v. Greg Manning Auctions Inc., 258 F. Supp. 2d 236 (S.D.N.Y. 2003) involved a stamp dealer who asserted RICO claims against various defendants whom he accused of participating in a bid-rigging scheme. The plaintiff alleged an enterprise comprised of nine corporations and seven individuals, all of whom allegedly committed mail and wire fraud. *Id.* at 247. The district court found that a distinct enterprise existed, but differentiated the facts of the case. It said, "*Unlike enterprises that only consist of a corporation and its employees*, here the bid-rigging enterprise is an amalgam of unrelated individual defendants and corporations." *Id.* (emphasis added.)

In *Moses v. Martin*, 360 F. Supp. 2d 533, 2004 U.S. Dist. LEXIS 24568 (S.D.N.Y. 2004), the court found that a RICO claim against a company, Deborah Martin Agency, Inc., and its principal, Deborah Martin, was sufficiently pled. But again, there, the "person" was identified as Deborah Martin and other individuals and the "enterprise" was the corporation. *Id.* 2004 U.S. Dist. LEXIS 24568 at *28.

Therefore, while Plaintiff is correct that it is possible for an entity to be both a RICO person and a member of a RICO enterprise, the enterprise must meet the distinctness requirement, i.e., that other entities in the enterprise are not defendants or that the entities that comprise the enterprise are different corporations or where an employee is alleged to be the

person and the company is alleged to be the enterprise. Here, Plaintiff is alleging that each of the named Defendants is the "person" and those same Defendants are the entities that comprise the various enterprises.

The Court finds that the Plaintiff has not sufficiently alleged individual "persons" who are distinct from the respective "enterprises." Viewing the Complaint in the light most favorable to the Plaintiff, as the Court must, the Court holds that the distinctiveness requirement is not met here. Despite the deficiency of the Plaintiff's pleadings on this point, the Court will afford Plaintiff the opportunity to file an Amended Complaint to attempt to cure this deficiency.

ii. Racketeering Activity--Mail and Wire Fraud

Racketeering activity is defined as the commission of one of the offenses (predicate acts) enumerated in 18 U.S.C. § 1961(1). Such racketeering activity under § 1961(1) includes mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. The mail and wire fraud statutes, which are analyzed in the same manner (*see United States v. Pierce*, 224 F.3d 158, 165 n.5 (2d Cir. 2000)), prohibit the use of the mails or interstate wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343.

The City alleges that by failing to file Jenkins Act reports, each Defendant "intentionally conceals the names of New York City residents who owe taxes on their cigarette purchases," and therefore has violated 18 U.S.C. §§ 1341 and 1343, the mail fraud and wire

fraud statutes.[11] (Am. Compl. ¶ 89.) In essence, the Plaintiff is saying that, although the Defendants' obligation to file Jenkins Act statements is not with it, but with the State, and there is nothing in the record to indicate that Plaintiff has any standing under the Jenkins Act because of any understanding or agreement between the City and the State regarding cigarette sales and excise taxes to stand in for the State, that nevertheless, Defendants' non-use of the mails or wires is a predicate act of mail or wire fraud.

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[11] The Court notes that Plaintiff's novel theory of causation here, based on the Jenkins Act (the Court is unaware of any other civil RICO actions based on the Jenkins Act), is questionable on several grounds. One question that arises is whether the Jenkins Act even applies in a civil case. The plain language of the Jenkins Act makes clear that it is a criminal act, to be used by the federal government against tobacco companies to prevent state cigarette tax avoidance prospectively, through the use of injunctions, and retrospectively, through the use of criminal penalties. It is extremely unlikely that any party other than the federal government may sue under the Jenkins Act. Despite a conclusory holding in a New York State case lacking any detailed reasoning, *Angelica Co. v. Goodman*, 52 Misc. 2d 844, 276 N.Y.S.2d 766, 767 (Supreme Court of New York, Special Term, New York County, 1966), which stated that "the city as well as the State has the power to enforce an act such as the Jenkins Act," and the reasoning of *Wash. v. www.dirtcheapcig.com, Inc.*, 260 F. Supp. 2d 1048, 1055 n.2 (D.C. Wash. 2003), where a district court found that a private right of action could be inferred from the Jenkins Act to allow the state department of revenue to file suit, this Court remains unconvinced that parties other than the federal government may sue under the Jenkins Act. As Plaintiff here is not basing its complaint on actual violations of the Jenkins Act, but merely using the Defendants' violations of the Act (which Defendants do not seem to deny) to bootstrap allegations of fraud, the Court need not reach the question of whether in a civil case a municipality may validly enforce a seemingly criminal statute that requires that reports be filed with state taxing authorities.

("A predicate act of mail or wire fraud occurs only when the enterprise is directed to conceal cigarette sales from state tax authorities by failing to file Jenkins Act reports or directed to effect sales by means of misrepresentations," Am. RICO Stmt. at 11.)

Where a plaintiff in a RICO claim alleges racketeering activity based on the predicate acts of violating the mail or wire fraud statutes, he or she must prove three elements: (1) scheme to defraud, including proof of intent; (2) money or property as object of scheme; (3) use of mails or wires to further the scheme. *See United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000); *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996).

The Plaintiff identifies the predicate acts as "mail and wire fraud committed through Internet websites and by telephone." (Am. RICO Stmt. at 6.) Specifically, Plaintiff alleges in its RICO Statement that the Defendants' racketeering activity consists of "intentionally concealing from New York State tax authorities cigarette sales made to New York City residents, in violation of the Jenkins Act;" and of "assurances given to Internet cigarette purchasers that their purchases will be concealed from New York State tax authorities;" and also of "statements to Internet cigarette purchasers that cigarettes sold to New York City residents are 'tax free.'" (Am. RICO Stmt. at 6.) In describing the pattern of racketeering, the Plaintiff states that "failing to file Jenkins Act reports constitutes a device or scheme to defraud state tax authorities of tax revenues and thereby constitutes mail and wire fraud." (Am. RICO Stmt. at 6.) Furthermore, Plaintiff states in its description of the pattern of racketeering that the false statements made

to consumers on Defendants' websites about the sale of "tax free" cigarettes and that the enterprises are not required to file Jenkins Act reports, "are an integral part of the scheme to defraud and also constitute mail and wire fraud." (Am. RICO Stmt. at 6.) Citing *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), the City argues that evasion of taxes through cigarette smuggling across interstate boundaries violates the federal mail and wire fraud statutes. (Pl. Mem. at 18.)

While the Court ultimately finds these arguments survive, it notes that they are extremely attenuated. A "scheme to defraud" under the mail or wire fraud statutes in the Second Circuit is described as "a plan to deprive a person of something of value by trick, deceit, chicane or overreaching." *United States v. Autuori*, 212 F.3d 105, 115, (2d Cir. 2000) (quoting *McNally v. United States*, 483 U.S. 350, 358, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), and *Hammerschmidt v. United States*, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511 (1924)). It should be noted that the actual transmissions that use the mails and wires do not have to be false or contain misrepresentations--only the scheme must be fraudulent. *See Zito v. Leasecomm Corp.*, No. 02-8074, 2004 U.S. Dist LEXIS 19778, at *34 (S.D.N.Y, Sept. 30, 2004) ("it is the fraudulence of the scheme itself, not any individual falsehood in any particular mail or wire communication, that must be alleged."); *Miltland Raleigh-Durham v. Myers*, 807 F. Supp. 1025, 1056 (S.D.N.Y. 1992). The Second Circuit has held that although the party alleging mail or wire fraud does not have to prove that the victim was actually defrauded, it must show that harm or injury to the victim was contemplated by the schemer. *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996) ("Fraudulent intent is essential to a scheme to

defraud.") (citations and quotations omitted); *see also Powers v. British Vita*, P.L.C., 57 F.3d 176, 184 (2d Cir. 1995) (stating that plaintiff must "adequately allege intent to defraud" the victim); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) ("The victims of the scheme need not have been injured. However, the government must show that some actual harm or injury was *contemplated* by the schemer.") (citations omitted).

The Plaintiff here argues that misrepresentations are made by the Defendants on their websites to consumers about the consumers' tax obligations and the tobacco companies' obligations to file reports under the Jenkins Act; and also that fraud occurs every time an enterprise completes an interstate cigarette sale and fails to report the sale to state tax authorities by the tenth day of the month following the sale. (Am. RICO Stmt. at 7.) These predicate acts, which are entangled throughout the Plaintiff's papers, are substantively very different and require separate analyses.

As to the argument regarding misrepresentations made to consumers on websites, the Court finds there is a difference between the tobacco companies stating that cigarettes are tax-free[12] and stating that the companies do not file Jenkins Act reports. The first statement is false, while the latter one is true. Thus, "misrepresentations" were made only by some of the

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[12] In its Complaint, the Plaintiff explains that "The New York State excise tax on cigarettes is presently $ 1.50 per pack. The New York City excise tax is $ 1.50 per pack. The combined State and City sales tax is $ 0.33 per pack." (Am. Compl. ¶ 40.) It is not clear how much of that $ 0.33 the City receives.

Defendants--those that advertised on their websites that consumers were under no obligation to pay state taxes. Based on the Plaintiff's Complaint, which of course is deemed to be true for the purposes of this Opinion, only two Defendants actually advertised that consumers do not have to pay any taxes.[13] As to the statements that the companies do not file Jenkins Act reports, it is unclear to the Court how the Defendants exercised their "scheme" by "trick, deceit, chicane or overreaching" with such true statements. Unlike other cases, where defendants' behavior and schemes were grossly offensive (*seeZito v. Leasecomm Corp.*, No. 02-8074, 2004 U.S. Dist LEXIS 19778, *3 (S.D.N.Y, Sept, 30, 2004) (detailing acts by defendants who used unscrupulous and deceptive marketing tactics to lure victims into signing unconscionable contracts to lease e-commerce services and products and reap enormous profits)), the defendants here do not deny the fact that they do not file Jenkins Act reports. While consumers could not be deceived by these true statements, the Court recognizes that, however attenuated, the fact that the Defendants state that they do not file the reports may have encouraged some consumers into purchasing cigarettes, safe in the knowledge that they would not get caught for not paying taxes. This could be considered part of the overall scheme to defraud the City of taxes owed.[14]

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[13] Defendants Hemi Group and Kai Gachupin's CigaretteSpecials.com's website says that "All sales are tax free!" and their buydiscountcigarettes.com has a flashing banner that says, "No tobacco tax." (Am. Compl, at ¶ 53.)

[14] "We believe that the Internet has grown significantly as a distribution channel for cigarettes in the United States, with *Internet sales accounting for nearly 2% of industry volume in 2002*;

The Court now turns to the "misrepresentations" made to the City by the act of *not* filing the Jenkins Act reports with the State taxing authorities. In addition to affirmative misrepresentations, the fraud statutes may be violated by "omissions of material information that the defendant has a duty to disclose." *United States v.* Autuori, 212 F.3d 105, 118 (2d Cir. 2000) (citing *United States v. Altman*, 48 F.3d 96, 102 (2d Cir. 1995)). The Fourth Circuit in *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975), held that a breach of statutory duty under the Jenkins Act constitutes mail fraud. This Court finds that Defendants' duty to file reports under the Jenkins Act with the State taxing authorities of cigarette sales is clear[15] under the statute, and therefore, the failure to do so may be construed as a misrepresentation resulting in fraud.

To meet the second element under §§ 1341 and 1343, the Plaintiff must show that the Defendants defrauded it of money or property. The Second Circuit has consistently held that tax losses from unpaid taxes are "property" for purposes of the mail and wire fraud statutes. *E.g. Fountain v. United States*, 357 F.3d 250 (2d Cir. 2004); *Porcelli v. United States*, 303 F.3d 452 (2d Cir. 2002); *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983). In *Fountain v. United States*, the defendant used wire transfers to exchange currency in furtherance of a scheme to circumvent Canadian taxes

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our analysis has that number growing to 5.9% of industry volume in 2005." (Buying Cigarettes Over The Internet, Am. RICO Stmt., Ex. B.)

[15] However, the Court recognizes that this statutory duty to file Jenkins Act reports is not a duty owed to the Plaintiff.

on cigarette products. 357 F.3d 250. The defendant was convicted of conspiring to launder the proceeds of a wire fraud scheme, 18 U.S.C. §§ 1956(a)(1)(A)(I) and 1956(h) with the illegal underlying conduct derived from the wire fraud statute, 18 U.S.C. § 1343. The defendant brought a habeas petition under 28 U.S.C. § 2255, alleging that he had not violated the wire fraud statute because, consistent with *Cleveland v. United States*, 531 U.S. 12, 148 L. Ed. 2d 221, 121 S. Ct. 365 (2000), the Canadian Government did not possess "property" in its hands at the time of the alleged fraud. *Fountain*, 357 F.3d at 251 (2d Cir. 2004). Analyzing the legislative history of the mail fraud statute and the state licenses at issue in the *Cleveland* decision, the Second Circuit observed that the "core concern" of the licensing scheme in *Cleveland* was regulatory and that monetary loss was not at all involved, therefore the "relevant inquiry is . . . whether the scheme prosecuted under the mail or wire fraud statute is designed to defraud the government of its revenues or of its licenses." *Id.* at 257. Thus distinguishing *Cleveland*, the Second Circuit squarely held that "taxes owed to the government--even if not collected--are property in the hands of the government." *Id.* Therefore, the mail and wire fraud statutes are applicable to the Plaintiff's allegation that it was defrauded of sales and excise taxes.

The RICO statute also requires that the enterprise be engaged in activities that affect interstate or foreign commerce. The standard in the Second Circuit regarding whether the use of mails and wires affects interstate or foreign commerce is generally low. "RICO plaintiffs may satisfy this element by showing only 'a minimal effect on interstate commerce.'" *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 173 n.12

(2d. Cir. 2004) (quoting *De Falco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2000)). Here, it is undisputed that the Defendants use the wires and mail to advertise, sell, and/or deliver their wares to other states, thus their overall scheme has an effect on interstate commerce.

b. Injury to Business or Property

The second standing requirement under RICO is that the injury be an injury to "business or property." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). The City alleges that it has been injured by the loss of tax revenues that results because Defendants are "intentionally withholding Jenkins Act reports from the New York [State] tax authorities." (Am. Compl. ¶ 2.)

The City's tax losses are "property" as defined under 1964(c), and therefore are recoverable in a RICO civil action.[16] *Porcelli v. United States*, 303 F.3d 452 (2d Cir. 2002) (defendant's fraudulent under-reporting of sales tax returns injury sufficient to support RICO and mail fraud convictions); *Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985)(reversing district court's dismissal for lack of standing of state department of revenue's RICO action against retailer who filed false state sales tax returns); *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 493-500 (E.D.N.Y. 2001)(governmental agency suffered injury to business or property, through

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[16] Whether the City is the proper authority to claim RICO for violating the Jenkins Act by mail and wire fraud is another question.

loss of cigarette tax revenues and increased costs of enforcement, for purposes of RICO standing).

Relying on *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) and *City of New York v. JAM Consultants, Inc.*, 889 F. Supp. 103 (S.D.N.Y. 1995), the Dirtcheap Defendants argue that, as a governmental entity, the City must allege injury to its business or property in its capacity as a party to a commercial transaction. (Dirtcheap Mem. at 3, 4.) In *Town of West Hartford*, a municipality brought a RICO action to recover damages incurred by the town in connection with a series of anti-abortion protests. The Town alleged that the protesters had injured its "business or property" by reducing its ability to respond to police and fire emergencies, by impairing the level of alertness of its police, and by forcing it to pay overtime wages. 915 F.2d at 103. The Second Circuit held that the Town failed adequately to plead the predicate offense of extortion, and accordingly failed to establish "racketeering activity" within the meaning of 18 U.S.C. § 1962(c). *Id. at* 102-103.

The Second Circuit analyzed the Town's claims under the standard of *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972). There, the Supreme Court rejected the State of Hawaii's damages claim for antitrust violations because the Clayton Act's requirement of injury to "business or property" referred to commercial interests or enterprises:

> Hawaii refers not only to injuries to a governmental entity's "general economy," but also to its "ability to carry out its functions," as falling outside the concept of statutory injury to

> its "business or property." The subsequent gloss in *Reiter v. Sonotone*, allowing a governmental entity to recover for such injury only when it functions "as a party to a commercial transaction," makes the point even clearer. Injuries of the sort asserted by the Town do not fall within the ambit of section 1964(c).

Town of West Hartford v. Operation Rescue, 915 F.2d 92, 104 (2d Cir. 1990)(internal citations omitted).

However, the Court later cautioned:

> We need not rule, however, that the Town's view of section 1964(c) is so implausible that, standing alone, it would warrant dismissal of the Town's RICO claim for failure of subject matter jurisdiction. Suffice it to say that the section 1964(c) problem heightens the already severe inadequacies of that claim which result from the Town's meritless invocations of the *Hobbs Act*. We reiterate, finally, our recent admonition that "the purpose of civil RICO liability does not extend to deterring any illegal act ... for which there are state and common law remedies."

Id. (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990)).

Subsequent authority provides divergent guidance on whether *Town of West Hartford* imposes a requirement that a municipality plead injury to its business or property "as a party to a commercial transaction" to meet the requirements of RICO standing. In dicta in *Attorney General of Canada v.*

R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001), specifically citing its discussion of the "party to a commercial transaction" requirement, the Second Circuit characterized as dicta the *Town of West Hartford* statement that "a government's additional law enforcement costs were not recoverable under RICO." 268 F.3d at 132 n.40. District courts in this Circuit are split on the question.[17]

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[17] *Compare Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 154 (N.D.N.Y. 2000)("In short, Town of West Hartford requires injury to the government's commercial interests in RICO claims. The Court has been unable to find any Supreme Court or Second Circuit cases that have overruled, abrogated, or otherwise departed from this holding to which this Court is bound."), and *City of New York v. JAM Consultants, Inc.*, 889 F. Supp. 103, 105 (S.D.N.Y. 1995) ("The Second Circuit has held that where a municipality sues under RICO, it must allege injury to its business or property in its capacity as a party to a commercial transaction)(internal citations and quotations omitted), *with European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 497 (E.D.N.Y. 2001)("No plausible reading of *Town of West Hartford* requires the inference of a novel standing requirement in order to reach its uncontroversial conclusion that the district court lacked subject matter jurisdiction to hear the Town's wholly implausible claims. In fact, the *Town of West Hartford* court explicitly stated that the plaintiffs' failure to satisfy the 'business or property' requirement was inessential to its holding."), *and United States v. Bellomo*, 954 F. Supp. 630, 642-43 (S.D.N.Y. 1997)("The Circuit's holding in *Town of West Hartford* ... turned on the special difficulties of applying the Hobbs Act in the public context. It cannot be applied uncritically outside that context, as indeed is suggested by the fact that the Court reiterated its prior holding that property under the Act includes, in a broad sense, any valuable right considered as a source or element of wealth ...")(internal citations and quotations omitted).

In light of the dicta-upon-dicta unsettled state of the law on the commercial transaction requirement under RICO, this Court on a motion to dismiss cannot say as a matter of law that the Plaintiff has failed to satisfy a requirement that may or may not exist. Accordingly, the Court finds that the City's loss of its right to collect sales taxes may be "injury to its business or property" for purposes of the RICO statute and so the Plaintiff survives the motion to dismiss on this element.

c. Causation

The third element that must be satisfied to establish standing under RICO is that the injury was caused by the violation of § 1962. The Multistate Defendants and the Dirtcheap defendants argue that the alleged RICO violation is not the proximate cause of any injury to the City and that therefore the City does not have standing to bring a Civil RICO claim. (Hemi Group Mem. at 8; Multistate 12(b)(6) Mem. at 8; Dirtcheap Mem. at 5-7.) The Multistate Defendants also argue that the City is not in the intended class of beneficiaries the Jenkins Act was intended to remedy, as the City is not statutorily entitled to receive the Jenkins Act reports. (Hemi Group Mem. at 8; Multistate 12(b)(6) Mem. at 8.)

The clause "by reason of" in 18 U.S.C. § 1964(c) limits standing to those plaintiffs who allege that the asserted RICO violation was the "proximate cause" as well as the "but for" cause of their injury. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532, 544 (1992); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 257 (2d Cir. 2004); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir.

2003); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 380 (2d Cir. 2001). Quoting the Supreme Court, the Second Circuit in *Ideal Steel* explained that "a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our ideas of what justice demands, or of what is administratively possible and convenient." 373 F.3d at 257 (quoting *Commercial Cleaning*, 271 F.3d at 380 (quoting *Holmes*, 503 U.S. at 268)) (quotations omitted).

In *Lerner v. Fleet Bank*, N.A., 318 F.3d 113, 122-23 (2d Cir. 2003), the Second Circuit provided a two-part test to determine proximate causation. First, a Plaintiff's injury must have been "proximately caused by a pattern of racketeering activity violating [18 U.S.C. §] 1962 or by individual RICO predicate acts," 318 F.3d at 122-23 (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990)) and second, the injury must have been "reasonably foreseeable." *Id.* at 123. *See also Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235-36 (2d Cir. 1999)(stating that as a general rule, proximate cause requires that both direct injury and foreseeability be found). In *Baisch v. Gallina*, 346 F.3d 366 (2d Cir. 2003), the Second Circuit provided further guidance on the first part of the *Lerner* test:

> In other words, a plaintiff does not have standing if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity or RICO predicate acts, even though the injury was proximately caused by some non-RICO violations committed by the defendants.

346 F.3d at 373.

In *Lerner*, investors who had lost money brought a civil RICO action against three banks, alleging that the banks had committed wire fraud and mail fraud by failing to file dishonored check reports for an attorney named David Schick with the New York Lawyer's Fund for Client Protection. The Second Circuit described plaintiffs' theory of causation:

> Plaintiffs claim that, by failing to report the bounced checks to the Lawyer's Fund as required by New York regulations, defendants prevented the New York State Attorney Discipline System from taking action against Schick. Had the Lawyer's Fund been informed that Schick was improperly overdrawing funds from his clients' escrow accounts, the Appellate Division would have immediately suspended or disbarred him from the practice of law; this would have led plaintiffs, the investors, to distrust Schick and discontinue their investments, thus sparing millions of dollars in losses.

Lerner, 318 F.3d at 123-24.

Because in *Lerner* and in this case, the plaintiffs allege RICO violations grounded in wire fraud and mail fraud, arising from failures to comply with reporting requirements, there is at least a superficial parallel between the facts in *Lerner* and those before this Court. In *Lerner* the Second Circuit found that:

> In order to demonstrate some link between the RICO violations alleged and the loss of their

> investments, plaintiffs must show that, if the defendant banks had not committed the predicate acts of mail and wire fraud, (1) unspecified third parties would have become aware that there were insufficient funds in the escrow accounts to cover Schick's checks; (2) the Lawyer's Fund, in some fashion, would then have become aware of these bounced checks; (3) the DDC or DGC, upon receiving the report of dishonored checks from the Lawyer's Fund, would have recommended to the Appellate Division that Schick be suspended or disbarred; (4) the Appellate Division would have investigated Schick and adopted this recommendation almost "immediately" after Schick bounced these checks; and (5) plaintiffs would have been made aware of Schick's removal from the practice of law in time to halt further investments. Each of the assumptions upon which this theory rests is inherently speculative.

318 F.3d at 123-24.

Plaintiff here states clearly that "a predicate act of mail or wire fraud occurs only when the enterprise is directed to conceal cigarette sales from state tax authorities by failing to file Jenkins Act reports or directed to effect sales by means of misrepresentations." (Am. RICO Stmt. at 11.) Therefore, to demonstrate a link between the allegedly fraudulent omissions of Jenkins Act reports to the State and the tax losses suffered by the City, the City must show that, were it not for the alleged mail and wire fraud of not filing reports, (1) the City would have received the Jenkins reports from the State, and (2)

the City would have known whom to pursue, and (3) would have located them, and (4) would have collected taxes from them. This chain of events is arguably almost as inherently speculative as the fact pattern in *Lerner*.

Entwined with the idea that failing to file Jenkins Act reports constitutes fraud is the argument that because the Defendants advertised their wares as being "tax free," and advertised that the transactions would not be filed with the State, consumers bought cigarettes online. Plaintiff's argument seems to be that if Defendants had not advertised as they did, the customers would have bought cigarettes from brick and mortar establishments within New York City and automatically would have paid the taxes imposed on each pack of cigarettes. Thus, the City would have obtained the taxes owed to it, without having to rely on Jenkins Act Reports to the State to go after non-cigarette-tax-paying Internet tobacco consumers in New York City. The Court notes that this chain of events is highly implausible. According to the Prudential Report, cited by the Plaintiff, and appended in its RICO Statement, the vast majority of Interstate cigarette purchasers initiate online purchases already knowing the "advantage" regarding taxes:

> We believe there are four primary reasons that the Internet has grown as a distribution channel for cigarettes:
>
> The most important, we believe, is that the consumers want to avoid state and municipal excise taxes that they would otherwise have to pay if they purchased cigarettes from a traditional "bricks and mortar" retailer.

(Am. RICO Stmt. Ex B, "Buying Cigarettes Over the Internet," at 3.)

Therefore, the argument that "misrepresentations" made on Defendants' websites induced otherwise tax-paying consumers to purchase cigarettes online, and is thus a proximate cause of Plaintiff's injury, is far-fetched.

Second, to establish proximate causation for RICO standing, a plaintiff must have suffered a direct injury that was arguably foreseeable to the defendant: "Central to the notion of proximate cause [under RICO] is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was 'reasonably foreseeable or anticipated as a natural consequence.'" *Lerner*, 318 F.3d at 123 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994)). The *Baisch* court explained that

> as an elaboration of this second prong relating to the directness of the injury, Lerner noted that "the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise." *Id.* at 124.

It was arguably foreseeable to Defendants that the City would be injured by their failure to file tax reports with New York State. Indeed, the Amended Complaint includes references to statements made by individual Defendants (acting as principals of the corporate Defendants) reflecting their knowledge of the increase

in New York City residents who purchased cigarettes after the increase in New York City taxes was implemented. (Am. Compl. ¶¶ 57, 59.)

The Multistate Defendants argue that the City does not have RICO standing because the City is not an intended beneficiary of the reporting requirements of the Jenkins Act. (Multistate Mem. at 8; HemiGroup Mem. at 8.) This amounts to an argument that Plaintiff does not have RICO standing because the City is not within the "zone of interest" of the Jenkins Act. However, the Second Circuit made it clear in *Baisch* that, unlike other circuits, statutory standing is included in a proximate cause analysis. 346 F.3d at 373. Furthermore, it held, that "we now clarify that it is inappropriate to apply a zone-of-interest test independent of this circuit's proximate cause analysis." *Id.*

Citing *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), the Dirtcheap Defendants argue that the City is required to demonstrate that it relied on Defendants' misrepresentations to prove the RICO predicate act of mail fraud. (Dirtcheap Mem. at 10). Because Plaintiff has not shown justifiable reliance upon Defendants' alleged fraud, the Defendants argue that the Complaint therefore fails to state a civil RICO claim. (*Id.* at 10.)

As part of the causation element of RICO, the Second Circuit has adopted a "reliance" component that plaintiffs seeking to recover under civil RICO where the predicate acts are mail or wire fraud, must prove. In *Welfare Fund v. Lollo*, 148 F.3d 194 (2d Cir. 1998), the court agreed with the district court judge in *Shaw v. Rolex Watch, U.S.A.*, 726 F. Supp. 969

(S.D.N.Y. 1989), that although the mail-fraud statute does not specify a reliance requirement, in order to satisfy the causation requirement of § 1964(c), the plaintiff in a civil RICO claim must prove reliance. 148 F.3d at 196-97. *See also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (stating that in the context of a RICO case that involved mail fraud claims, it was necessary for the plaintiff to demonstrate that the defendant's misrepresentations were relied on by the plaintiff and that as a result of such reliance, the plaintiff suffered harm); *Bank of China v. NBM LLC*, 359 F.3d 171 (2d Cir. 2004) (holding that it is well established in the Second Circuit that for civil RICO claims involving mail fraud, the plaintiff must show "reasonable reliance" on the defendant's misrepresentations in order to successfully prove a causal connection between the defendant's violation and the plaintiff's injury)).

The Dirtcheap Defendants argue that any alleged omission by failure to file reports required under the Jenkins Act does not harm the City's business or property, because the Jenkins Act requires only that reports be provided to New York State, and not to the City of New York. (Dirtcheap Mem. at 6.)

Because the Jenkins Act reports under the statute must be filed with the State, not the City, this argument raises the question of "whether a plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether it was the plaintiff or a third party that was deceived." *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004).

While reliance is a necessary component to a successful mail or wire fraud claim under civil RICO, the Second Circuit "has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the fraud." *Ideal Steel*, 373 F.3d 251, at 262 (analyzing cases that have held that a civil RICO claim based on mail or wire fraud must show reliance on the misrepresentation and stating that "none of those cases held that the plaintiff's own reliance was required").

Here, if the Defendants do not file Jenkins Act reports with the State, the City alleges it has no way to learn of cigarette sales made by Defendants to City residents. The State relies on the tobacco companies to follow the law and file reports and the City relies on the State to provide it with information. When the companies do not file the reports with the State, the City, consequently, is defrauded of taxes it is owed. Because this Court found that failure to file the Jenkins Act reports with New York State is part of a "scheme to defraud," and thus constitutes the predicate acts of mail and wire fraud, the fact that the State, a third party, was deceived, has no bearing on the question of proximate cause. "[A] plaintiff has standing to pursue a civil RICO claim . . . . where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Id.* at 263. Therefore, the failure to file reports with the State may be construed as a misrepresentation resulting in an injury to the City and survives a motion to dismiss.

Accordingly, the City has pleaded an injury that is directly related to Defendants' predicate acts of mail

and wire fraud under 18 U.S.C. § 1961(1), which was reasonably foreseeable to the Defendants.

2. Underlying Claim

The Dirtcheap Defendants argue that, because the "underlying claims" fail, the complaint fails to state a civil RICO claim under 18 U.S.C. § 1962(d), which is the conspiracy provision of RICO. (Dirtcheap Mem. at 11.) Plaintiff alleges that each Defendant conspired to violate § 1962(c), in violation of § 1962(d).

Section 1962(d) of the RICO statute provides that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The requirements for a RICO conspiracy charge generally are low. In a civil RICO claim, a plaintiff must allege that the defendant "knew about and agreed to facilitate the scheme." *Baisch v. Gallina*, 346 F.3d 366, 377 (2d Cir. 2003) (quoting *Salinas v. United States*, 522 U.S 52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). Furthermore, one must show that the defendant "embraced the objective of the alleged conspiracy and agreed to commit predicate acts in furtherance thereof." *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000) (quoting *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994)) (quotations omitted).

Of course, whether Plaintiff prevails on this claim depends on whether it prevails on its § 1962(c) claim. Given the low threshold and the fact that Defendants base this motion to dismiss only on the fact that the underlying claim fails, the Court finds that, if, upon amending its Complaint, the Plaintiff successfully

alleges standing under RICO for 1962(c), this claim, too, will survive the motion to dismiss.

However, without establishing the distinctness requirement under § 1962, Plaintiff has not alleged sufficient standing to assert its RICO claims against defendants for violation of § 1962(c) or (d). Therefore, Defendants' motion to dismiss the RICO cause of action is GRANTED, with leave to amend the Complaint to cure this deficiency.

F. Pendent State Jurisdiction Claims

1. NY General Business Law § 349

Plaintiff also has asserted a state law claim for violation of General Business Law § 349. The Multistate Defendants argue that, because Jenkins Act reports are provided to state authorities and not to consumers or to the City, a failure to file Jenkins Act reports cannot constitute a violation of GBL § 349. They argue that because Jenkins Act reports are not directed at consumers, they cannot have been materially misleading, and also that the City's inability to claim taxes cannot be causally linked to the Defendants' omissions of the act of filing Jenkins Act reports. (Multistate 12(b)(6) Mem. at 1011; Hemi Group Mem. at 17.) The Multistate Defendants also argue that the statements in notices on websites are not material representations on which consumers could rely (Multistate 12(b)(6) Mem. at 11; Hemi Group Mem. at 18), and that there is no causal link between the Defendants' notices to consumers and any injury to the City. (Multistate 12(b)(6) Mem. at 12-13; Hemi Group Mem. at 20.) Dirtcheap Defendants also argue that the City has failed to allege the requisite

elements of GBL § 349, because fully disclosed acts are not deceptive under § 349, statements of opinion are not actionable under § 349, and the Defendants did not cause actual injury to the consuming public or to the City. (Dirtcheap Mem. at 11-13.)

The New York Consumer Protection Act, codified at § 349(a) of the New York General Business Law, provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." Although originally written to enable the state attorney general to file suit, the statute was amended in 1980 to include a private right of action, "to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the attorney general for enforcement." *Blue Cross and Blue Shield of New Jersey, Inc., et al. v. Philip Morris USA Inc., et al.*, 3 N.Y.3d 200, 818 N.E.2d 1140, 2004 N.Y. LEXIS 2440, 785 N.Y.S.2d 399 (N.Y. 2004) (quoting Assembly Mem. in Support, Bill Jacket, L 1980, ch. 346). Section (h) of the GBL states that, "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such lawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions."[18]

"Person" is not defined in the GBL § 349 statute, however, courts have allowed private actions by

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[18] Because Plaintiff is not the Attorney General of New York State and does not point to any agreement with the State that authorizes it to sue in the State's place, the Court presumes Plaintiff has brought this claim under section (h) of the state statute.

companies. *See Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (stating, "corporate competitors now have standing to bring a claim under this [statute] . . . so long as some harm to the public at large is at issue.") (quoting *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 786 F. Supp. 182, 215 (E.D.N.Y.), vacated in part on other grounds, 973 F.2d 1033 (2d Cir. 1992)) (and stating, "section 349 does not expressly provide a right of action by one business competitor against another, but it does provide a right of action to any person who has been injured by reason of any violation of this section.") (quoting *H2O Swimwear, Ltd. v.* Lomas, 164 A.D.2d 804, 560 N.Y.S.2d 19, 21 (N.Y. App. Div. 1st Dep't 1990) (quotations omitted). The New York Court of Appeals has commented on the statute's consumer-protective purpose, stating, "As shown by its language and background, section 349 is directed at wrongs against the consuming public." *214 Pension Oswego Laborers' Local Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 647 N.E.2d 741, 623 N.Y.S.2d 529. 532 (N.Y. 1995). The Court of Appeals went on to say, "as a threshold matter, plaintiffs claiming the benefits of section 349--whether individuals or entities [such as the plaintiff union funds]--must charge conduct of the defendant that is consumer-oriented." *Id.* This Court is unaware of any other cases brought by New York City under GBL § 349 and it is unclear to the Court, given the consumer-oriented nature of this law, that a government entity such as the Plaintiff is the proper plaintiff to bring suit under it. However, without case law explicitly stating the City may not bring its suit, the Court will analyze the Plaintiff's claims.

For a successful GBL § 349 claim, a plaintiff must allege (1) deceptive acts or practices directed toward

consumers; (2) the acts are misleading in a material way and (3) the plaintiff has been injured as a result. *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (per curiam) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N. A.*, 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995)). An act or practice that is deceptive is one that would mislead a consumer. *S.Q.K.F.C., Inc, v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629 (2d Cir. 1996) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, N. A., 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995)).

The Plaintiff argues first that Defendants' failure to file Jenkins Act reports is "materially deceptive and misleading to New York City consumers." (Am. Compl. ¶ 107.) It further argues that Defendants' statements that their cigarettes are "tax-free" and/or that defendants are not required to file Jenkins Act reports "are materially deceptive and misleading to New York City consumers." (*Id.* at ¶ 108.) As a result of the Defendants' "deceptive and misleading conduct," the City claims it has been injured because it has been unable to collect taxes owed. (*Id.* at ¶ 109.)

Plaintiff's first argument under this claim is illogical. The Court fails to see how, first, the Defendants' failure to file the Jenkins Act reports is "a deceptive act or practice," to consumers and second, how not filing the reports is misleading to New York City *consumers*. The act of not filing reports understandably results in the City not knowing which

consumers[19] to tax, but the Court finds there is no basis for the City to claim that the act of not filing the reports misleads consumers in any way, as required under the statute.

Plaintiff's second argument--that statements made by Defendants on their websites that their cigarettes are "tax-free" and that they are not required to file Jenkins Act reports are materially deceptive--is viable. However, not all Defendants make such assertions. Only certain Defendants state on their websites that their cigarettes are "tax-free."[20] Those Defendants who do not deny the fact that they do not file Jenkins Act reports have made true statements and therefore not misleading statements.[21] Other Defendants, however, explicitly state on their websites that they do not have

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[19] Indeed, one could argue that the consumer benefits from the deceptive act or practice.

[20] Defendants Hemi Group and Kai Gachupin's CigaretteSpecials.com's website says that "All sales are tax free!" and their buydiscountcigarettes.com has a flashing banner that says, "No tobacco tax." (Am. Compl. ¶ 53.)

[21] According to the Amended Complaint, the following Defendants made statements on their websites that they do not file Jenkins Act reports: Richard Urrea, Daniel R. Urrea and Cyco.net (on Cycocigs.com and aabakismokes.com); Hemi Group and Kai Gachupin (on Adobecigarettes.com, FreeCigs4u.com, BuyDiscountCigarettes.com and CigaretteSpecials.com); Dirtcheapcig.com, Fred Teutenberg IV and Fred Teutenberg V (on dirtcheapcig.com); Michael E. Smith (on paylesscigs.com); Hooray's, Stephen F. Knopp, and Dmitriy Zilberman (on smokes-direct.com and cigsonline.com); and S4L Inc. and William C. Baker III (on s4l.com). (Am. Compl. ¶ 53.)

to file the reports.[22] Only the Defendants that state their cigarettes are tax-free and those that state they do not have to file Jenkins Act reports could be construed as having misled consumers. Plaintiff's reasoning implies that such statements induce naive consumers who just happened to wander onto these websites while surfing the Internet and were totally unaware of "tax free" cigarette sales before, into purchasing cigarettes from such websites, knowing the sales will not be reported to the State. However, as acknowledged in the Prudential Financial Research Report, cited by Plaintiff and appended to its RICO Statement, the number of Internet customers who learn about the alleged tax advantage only *after* logging onto Defendants' websites and who are then convinced to purchase cigarettes, is *de minimis*.[23] (Am. RICO Stmt. Ex B, "Buying Cigarettes Over the Internet.") Nevertheless, because some consumers *may* have been misled in a material way by the Defendants' misrepresentations, the Plaintiff's Complaint only as to Defendants Dirtcheapcig.com, Fred Teutenberg IV, Fred Teutenberg V, Hooray's, Stephen K. Knopp, Hemi Group, and Kai Gachupin meets this first element.

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[22] According to the Amended Complaint, the following Defendants made statements on their websites that they do not have to file Jenkins Act reports: Dirtcheapcig.com, Fred Teutenberg IV and Fred Teutenberg V (on dirtcheapcig.com); Hooray's and Stephen K. Knopp (on smokes-direct.com and cigsonline.com); and Hemi Group and Kai Gachupin (on CigaretteSpecials.com, buydiscountcigarettes.com and FreeCigs4u.com). (Am. Compl. ¶ 53.)

[23] See discussion infra (section II(E)(1)(a)), and quote from Exhibit B regarding consumers' knowledge about the "advantage" of purchasing cigarettes online.

The Court now turns its attention to the injury element required under GBL § 349(h). The Second Circuit in *Maurizio*, 230 F.3d 518, at 522, said that for a GBL § 349 claim to prevail, "the gravamen of the complaint must be consumer injury or harm to the public interest" (quoting *Azby Brokerage, Inc. v. Allstate Ins. Co.*, 681 F. Supp. 1084, 1089 n.6 (S.D.N.Y. 1988)). Even claims brought by a commercial claimant, not a consumer, must allege harm to the public interest. *See, e.g., Gucci America, Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003); *La Cibeles, Inc. v. Adipar, Ltd.*, No. 99-4129, 2000 U.S. Dist. LEXIS 12676, at *49 (S.D.N.Y. Sept. 1, 2000). Here, Plaintiff has alleged only that it has been injured by its inability to collect taxes owed. (Am. Compl. at ¶ 107.) It has failed to allege a consumer injury or harm to the public interest. While not argued by Plaintiff, an argument that when a government entity is prevented from collecting taxes, all citizens are hurt, is too indirect an injury to satisfy this element. Accordingly, even for those few consumers who may have been misled by the false representations, based on Plaintiff's failure to allege sufficient consumer harm, the claim under GBL § 349 fails.

Because any attempt to cure this deficiency would be futile, Defendants' motion to dismiss is GRANTED and leave to amend is DENIED.

2. Common Law Fraud

The Plaintiff also has asserted a state law claim for common law fraud. The Multistate Defendants argue that because the City has not established a misrepresentation or omission "to it," it does not state

a claim for fraud. (Multistate 12(b)(6) Mem. at 15; Hemi Group Mem. at 21.) These Defendants also argue that the City has not stated a claim for common law fraud because the City is not entitled to rely upon representations or omissions to third parties. (Multistate 12(b)(6) Mem. at 17; Hemi Group Mem. at 23.) The Dirtcheap Defendants argue that Plaintiff fails to identify a misrepresentation of fact, to allege reliance, and to show that the alleged fraud is the proximate cause of the City's injury. (Dirtcheap Mem. at 15.)

The elements of fraud under New York law are well established: (1) a misrepresentation or a material omission of material fact which was false and known by defendant to be false, (2) was made for the purpose of inducing the plaintiff to rely on it, and (3) was justifiably relied upon by the plaintiff (4) who then suffered an injury as result of such reliance. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76; 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (N.Y. 1996) (citations omitted). *See also Kaufman et al. v. Cohen et al.*, 307 A.D.2d 113, 119, 760 N.Y.S.2d 157 (N.Y. App. Div. 1st Dep't NY 2003); *Welfare Fund v.* Lollo, 148 F.3d 194, 196 (2d Cir. 1998).

Here, the City argues that the Internet tobacco companies defrauded it by not filing Jenkins Act reports with the proper New York State taxing authorities (Am. Compl. ¶ 111), the acts of which were "intentional omissions to state material facts." (Id. at ¶ 113.) "Nondisclosure is tantamount to an affirmative misrepresentation where a party to a transaction is duty-bound to disclose certain pertinent

information."[24] *Callahan v. Callahan*, 127 A.D.2d 298, 300, 514 N.Y.S.2d 819 (N.Y. App. Div. 3d Dep't 1987)). *See also Nasaba Corp. v. Harfred Realty Corp.*, 287 N.Y. 290, 293, 39 N.E.2d 243 (N.Y. 1942) ("Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact."). The Court recognizes that Defendant cigarette companies are required by statute to disclose to state authorities the information found in Jenkins Act reports. However, the statute, 15 U.S.C. § 375 et seq., requires that Jenkins Act information be provided to the State, not the Plaintiff.

Furthermore, the Defendants validly point out that the reliance element is lacking in the City's argument. "Because the Jenkins Act requires that reports be filed with the State and not the Plaintiff . . . Plaintiff cannot rely on this omission as a basis for fraud." (Dirtcheap Mem. at 16.) Essentially, the Defendants argue that the Plaintiff is one step removed from the real beneficiary (the State) under the statutory obligation.

In analyzing the third element of the standard for common law fraud, that of reliance,[25] the Second

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[24] However, the Court notes that this duty to disclose is most often raised in the context of a business transaction or contractual obligation, which is not the case here, where the Plaintiff and Defendants do not have any relationship at all outside of this lawsuit.

[25] The Court notes that the reliance element also is required under fraudulent concealment. *See, e.g., Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l* Bank, 850 F. Supp. 1199, 1222 (S.D.N.Y. 1994)(agreeing with the California Supreme Court that,

Circuit in *Welfare Fund v. Lollo* focused on "whether the plaintiff must be the person to whom the misrepresentation was directed, who knew of it, and who relied upon it." 148 F.3d 194 at 196 (2d Cir. 1998) (citing cases). The court concluded that a plaintiff "does not establish the reliance element of fraud for purposes of . . . New York law by showing only that a third party relied on a defendant's false statement." *Id.* (citing *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 39 n.8 (S.D.N.Y. 1992) ("A plaintiff has failed to state a claim for fraud when he alleges merely that the misrepresentation in question was made to or relied on by a third party."), *aff'd*, 23 F.3d 398 (2d Cir. 1994); *Garelick v. Carmel*, 141 A.D.2d 501, 529 N.Y.S.2d 126, 128 (N.Y. App. Div. 2nd Dep't 1988) (stating that in order to plead a valid fraud action, "the complaint must set forth all of the elements of fraud including the making of material representations by the defendant to the plaintiff"); *Escoett & Co. v. Alexander & Alexander, Inc.*, 31 A.D.2d 791, 296 N.Y.S.2d 929, 929 (N.Y. App. Div. 1st Dep't 1969) (per curiam) (finding that defendant's fraud counterclaim failed because "representations to which the defendant complains were made to third parties and not to it, and those representations were relied upon those third parties and not by it")). Also relevant to the present case, the Second Circuit noted approvingly of a district court decision, *Shaw v. Rolex Watch, U.S.A.*, 673 F. Supp. 674 (S.D.N.Y. 1987), where the judge

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"it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 23 Cal.Rptr.2d 101, 858 P.2d 568 (1993)); *Congress Fin. Corp. v. John Morrell & Co.*, 790 F. Supp. 459, 472 (S.D.N.Y. 1992).

differentiated between a RICO claim based on mail fraud and a claim based on common law fraud. The district court stated that, unlike a RICO causation, "New York courts have consistently held that a claim of fraud will not lie when premised on the reliance of a third party." *Lollo*, 148 F.3d at 197 (citing *Shaw*, 673 F. Supp. at 682).

Here, the Jenkins Act reports are to be filed with the State, not the City. Therefore, while the City claims it cannot enforce its tax claims against consumers without information contained in the Jenkins Act reports, those reports are to be filed with the non-party State, not the Plaintiff. Thus, it is the State that relies on Defendants' act (or nonact) of submitting the reports. Unlike a RICO cause of action, Plaintiff in a common law fraud cause of action, cannot rely on the reliance of a third party. Furthermore, because it is unclear to the Court from Plaintiff's Complaint how the City receives information from the State regarding cigarette sales transactions, this alleged reliance is further attenuated.

Accordingly, reading the Complaint in the light most favorable to the Plaintiff, Plaintiff has failed to plead the elements of common law fraud adequately in its claim. Defendants' motion to dismiss on this claim is GRANTED. Again, because amending the Complaint for this cause of action would be futile, leave to amend is DENIED.

3. Preemption of State Law Claims by Commerce Clause

The Hemi Group Defendants argue that the City's state law claims are preempted by the Commerce

Clause. (Hemi Group Mem. at 9.) Because this Court finds that Plaintiff's state law claims fail, it need not and does not reach this question.

4. Preemption by Indian Commerce Clause

The Hemi Group Defendants argue that the City's state law claims are preempted by the Indian Commerce Clause.[26] (Hemi Group Mem. at 13.) Because this Court finds that Plaintiff's state law claims fail, it need not and does reach this question.

III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES Defendants' motions to dismiss for lack of personal jurisdiction; DENIES Defendants' motions to dismiss for improper venue; and DENIES Defendants' motion to transfer the action to Kentucky, Missouri, New Mexico or Virginia; GRANTS Defendants' motions to dismiss for failure to state a claim based on the RICO statute, but GRANTS Plaintiff leave to amend to replead the element of distinctness as required under RICO; GRANTS Defendants' motions to dismiss for failure to state a claim, based on GBL § 349; and GRANTS Defendants' motions to dismiss for failure to state a claim, based on common law fraud. In accordance with this Opinion, Plaintiff may file a Second Amended Complaint within forty-five (45) days of the date of this Opinion. Within thirty (30)

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[26] This argument in the Hemi Group's Memorandum to dismiss is captioned, "Plaintiff's State Law Claims Are Preempted By The Indian Commerce Clause and the Supremacy Clause," however, the Defendants do not appear to make any argument based on the Supremacy Clause, therefore, the Court does not address it.

days of being served with the Amended Complaint, Defendants shall answer the Complaint.

SO ORDERED

Dated: New York, New York

January 27, 2005

Deborah A. Batts

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

No. 06-1665-cv(L)

[Dated October 30, 2008]

Dennis Jacobs
CHEF JUDGE

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of October two thousand and eight,

City of New York,
Plaintiff-Appellant,

v.

Smokes-Spirit.Com, Inc., Michael Klee, www.smokincheap.com, C4LESS, LLC, John Does 1-100, Vincent Klee III, Jeff Marc LeBlanc, National Wholesale, LLC and Natalie Saalfeld,
Defendants-Appellees,

Joyce E. Houle, doing business as Indiancreektobacco.com, Kerry Varline, doing business

as Keweenaw Bay Outfitters & Trading Post, Laurie Patterson, Cigarette Outlet, Inc., Walid Enterprises, Inc., A.E. Sales LLC, Marilyn Samuelson, Allen Edmo, Tonna Edmo, Allen Smith, VJ Inc., A1 Enterprises, Inc., David Ray, doing business as Discount Cigarettes, Gerald A. Fow, doing business as Dannystobacco.com, Esmokes, Inc., ESM Holdings, Inc., PA Resources, Inc., doing business as Tobacco123.com, Wayne Stull, Paul Rainburd, doing business as Silver Cloud Smoke Shop, Terry Kilgore, Gary E. Kirschner and Scott Welker,

Defendants.

ORDER

Appellee Hemi Group, LLC., Appellee Kai Gachupin, et al having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

APPENDIX E

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 U.S.C. § 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section

1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice [influencing or injuring officer or juror generally]), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons)[.], section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual

exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating

to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the

United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States

district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

OPPOSITION BRIEF

125 (2)

No. 08-969

Supreme Court, U.S.
FILED
APR 3 - 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

HEMI GROUP, LLC, and KAI GACHUPIN,

Petitioners,

-v.-

CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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of Counsel.

*Counsel of Record

April 3, 2009

QUESTION PRESENTED

Does State government and its subdivisions have standing under RICO because lost tax revenue may constitute an injury to "business or property" in accord with the statute and relevant authority?

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THE CASES PETITIONERS RELY ON INVOLVE VERY DIFFERENT FACTUAL BASES OF AMORPHOUS INJURIES SUCH AS ADDITIONAL PUBLIC EXPENDITURES OR LOST EMPLOYEE SALARIES.

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No. 08-969

IN THE SUPREME COURT OF THE UNITED STATES

HEMI GROUP, LLC, and KAI GACHUPIN,

Petitioners,

-v.-

CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Respondent, the City of New York ("the City"), brought four civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), against various defendant out-of-state cigarette retailers, including the instant petitioners, the Hemi Group and Kai Gachupin ("petitioners"). The City alleges that petitioners actively schemed to defraud the City of tax revenues through the sale of cigarettes to City residents over the Internet. By refusing to

report purchases by City residents as required under the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and advertising that concealment and representing the cigarettes as "tax-free," petitioners commit mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343. As a result, the City is unable to collect use taxes owed on the sales and petitioners have thus injured the City of New York through lost tax revenues.

Background & Litigation History.

Taking advantage of New York City's legislative decisions to maintain high cigarette prices through imposed cigarette taxes, petitioners, situated in jurisdictions where negligible taxation yields low cigarette prices, use the Internet to sell their low-priced wares to consumers in "high-tax" jurisdictions, including New York City. In essence, the economic foundation of petitioners' business operations rests on tax evasion.

Specifically, New York State imposes a tax on all cigarettes used or sold in the State. *See* N.Y. Tax Law §§ 471, 471-a. New York State law also authorizes the City of New York to impose its own tax on cigarettes. *See* N.Y. Unconsol. Law § 9436(1). Pursuant to this authority, the City imposes a tax on all cigarettes possessed in the City for sale or use. *See* N.Y.C. Admin. Code § 11-1302. In-state, these taxes are collected through the sale of tax stamps to in-state vendors. *See* N.Y. Tax Law § 471. Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes.

Because such use taxes typically go unpaid, to offset the loss of state taxes caused by the

interstate taxing discrepancies, in 1949, Congress enacted the Jenkins Act, 15 U.S.C. §§ 375-78, to require out-of-state cigarette sellers to file a report with the tobacco tax administrator of each state into which the seller ships cigarettes to non-distributors. The report identifies the name, address, and quantity of cigarettes purchased by the non-distributor state residents. 15 U.S.C. § 376; *see also* S. Rep. No. 84-1147 (1955), reprinted in 1955 U.S.C.C.A.N. 2883, 2883-84 (explaining that the Jenkins Act "was enacted for three major reasons: (1) the large and increasing loss of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in interstate commerce to consumers; (2) the discrimination caused by this evasion against sellers of cigarettes in States having a higher tax than the tax of the seller States; and (3) the fact that this evasion was accomplished through the use of the United States mail." (quoting from the report of the Committee on Ways and Means)). The information provided by out-of-state cigarette sellers to state taxing authorities under the Jenkins Act provides states the information necessary to collect the payment of cigarette taxes directly from the purchasers.

In this case, petitioners advertised to cigarette purchasers that they "do not share your personal information with any third-party, including State taxing authorities" and refused to file Jenkins Act reports (9a). Petitioners do so because collection of the use tax by New York City from petitioners' customers would have wiped out virtually all of their customers' "savings," and, so, any incentive to continue patronizing petitioners' businesses. Petitioners have never disputed that

they concealed sales or failed to file Jenkins Act reports.

Under RICO's civil enforcement mechanism, "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C. § 1964(c). To have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

Relying on ample case law holding that the intentional failure to file Jenkins Act reports amounts to a violation of the mail and wire fraud statues by depriving the affected states of the ability to collect cigarette excise taxes, the City commenced this RICO action against petitioners and other Internet cigarette sellers, which action was later consolidated with three others on appeal.[1]

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[1] The specific descriptions of the defendants and the makeup of the enterprises are detailed in the Circuit's opinion (12a-15a). As to petitioners, the City alleges that the Hemi Group, LLC ("Hemi Group"), incorporated in New Mexico, is an enterprise and that the person associated with it is Kai Gachupin, the owner or officer of Hemi Group (14a-15a). The City also alleges an alternative

The City alleges that petitioners: (1) advertise their cigarettes over the Internet to City residents, (2) ship the orders by common carrier or the United States Postal Service into New York City, and (3) refuse to comply with the Jenkins Act registration or reporting requirements (10a). The City further alleges that petitioners' failure to comply with the Jenkins Act is an essential part of their business model because the savings that customers obtain from buying the cigarettes online are almost entirely attributable to the fact that the New York State and City taxes are not included in the cigarettes' sales price (10a).

As alleged, petitioners not only fail to inform customers of the use tax obligations, but also make false representations to customers concerning the tax. Among other things, the City contends that petitioners affirmatively advertise their cigarettes as "tax-free" and assure customers that sales would not be reported to the New York State tax authorities (11a).

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association-in-fact enterprise consisting of the Hemi Group and A1 Enterprises, Inc. ("A1 Enterprises"), a New Mexico corporation, which sells cigarettes over the Internet (14a-15a). According to the allegations, "A1 Enterprises works with the Hemi Group to conceal from New York City cigarette sales made by Hemi Group to New York City residents." The persons alleged to be associated with the Hemi Group association-in-fact enterprise are Gachupin and the Hemi Group (15a).

Furthermore, New York State and New York City have entered into various agreements for the administration and collection of cigarette taxes (9a-10a).[2] In light of the agreements, the City alleges that "with respect to the collection of cigarette taxes, New York City will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act reports" (10a).

The City's pleadings thus alleged that petitioners' predicate acts of mail and wire fraud -- the non-filing of Jenkins Act reports -- injured the City in its business and property: by withholding

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[2] The latest such agreement, dated June 28, 2002, provides (10a n.6):

"It is agreed that Taxation [the New York State Department of Taxation and Finance] and Finance [the New York City Department of Finance] shall cooperate fully with each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes as follows:

(1) Information obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements; . .

(3) All violations of Article 20 of the Tax Law or Chapter 13 of Title 11 of the [Administrative Code of the City of New York] and all facts or information tending to indicate any such violation."

the required Jenkins Act reports, petitioners conceal taxable sales to City residents, making it impossible for the City to collect its cigarette excise taxes and resulting in lost tax revenue.

Finally, the City alleges that it has lost "tens[,] if not hundreds[,] of millions of dollars a year in cigarette excise tax revenue" due to the combination of the withholding of sales information, failure to register as cigarette sellers, and the individual taxpayers' failure to voluntarily pay use taxes to the City (11a). As relief, the City seeks to: (1) recover three times the amount of the tax revenue lost as a result of petitioners' violations; (2) require prospective compliance with the Jenkins Act; (3) require informing customers that taxes are owed on purchases from their websites and that petitioners file Jenkins Act reports; and (4) recover attorneys' fees (11a-12a).

The District Court's Orders.

In its 2005 opinion, the U.S. District Court for the Southern District of New York (Batts, D.J.) rejected most of petitioners' numerous challenges to the complaints, including arguments concerning the alleged lack of an injury to business or property and causation (144a-148a). The District Court nonetheless dismissed pursuant to Fed.R.Civ.P. 12(b)(6), finding that the City failed to sufficiently plead individual "persons" distinct from the respective "enterprises," but afforded the City the opportunity to file an amended complaint (Appen. C, 93a-170a; *City of New York v. Cyco.net, Inc.*, 383 F.Supp.2d 526 (S.D.N.Y. 2005)).

In its subsequent 2006 opinion, the Court dismissed the second amended complaints for failure to state a claim, finding that the two alternative forms of RICO enterprises were insufficiently pled, including because the alleged RICO persons (employees and/or officers of the businesses) did not have individual duties to file Jenkins Act reports (Appen. B, 70a-92a; *City of New York v. Nexicon, Inc.*, 2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. 2006)).[3]

The Order of the Circuit Court of Appeals.

By opinion issued September 2, 2008, the Second Circuit vacated in large part the District Court's judgment and reinstated the majority of the federal RICO claims, severing them from the state claims and remanding for immediate further proceedings (Appen. A, 1a-69a; *City v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008), *reh. & reh. en banc denied*, __F.3d__ (2d Cir. 2008)).

In relevant part, with respect to the issue of injury to "business or property," the Circuit held (33a-34a):

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[3] In addition, the Court dismissed all the State law claims without leave to file an amended complaint (158a-168a, *City of New York v. Cyco.net, Inc.*, 383 F.Supp.2d 526, 561-66 (S.D.N.Y. 2005), *vacated in part by City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008); *NCCigarettes*, No. 03 Civ. 7715, 2005 U.S. Dist. LEXIS 2794, **9-10 (S.D.N.Y. Feb. 9, 2005)).

As noted above, one of the requirements for a civil RICO claim is that plaintiff be injured in its "business or property." 18 U.S.C. § 1964(c). Defendants argue that the City's allegations of lost taxes do not allege an injury to the City's "business or property" because that injury was not one the City incurred as a party to a commercial transaction. This argument finds support in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990), where we suggested that a municipality must have sustained its injury as a party to a commercial transaction to have standing under RICO. However, we have since explained that our statements to that effect in *Town of West Hartford* were merely *dicta*. *See Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000, 123 S. Ct. 513, 154 L. Ed. 2d 394 (2002).

We see no reason to import an additional standing requirement on municipalities for RICO claims, and thus expressly reject our *dicta* to the contrary in *Town of West Hartford*. *See Sedima [S.P.R.L. v. Imrex Co.]*, 473 U.S. [479], 495, 497-500 [1985] (noting that "RICO is to be read broadly," and overruling our Court's engrafting of a "racketeering injury"

requirement which found no support in the statute or legislative history). We have consistently held that tax losses from unpaid taxes are "property" for purposes of the mail and wire fraud statutes. *See, e.g., Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); *United States v. Porcelli*, 865 F.2d 1352, 1355 (2d Cir.) (affirming mail fraud and RICO convictions for fraudulent under-reporting of taxes to State), *cert. denied*, 493 U.S. 810 (1989); [*United States v.*] *DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984)]. Moreover, in *Anza*, the Supreme Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. Thus, we hold that lost taxes can constitute injury to "business or property" for purposes of RICO, and conclude that the City has adequately met this requirement notwithstanding that its injury did not arise from its participation in a commercial transaction. *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314-16 (7th Cir. 1985) (rejecting the notion that a State government unit suing under RICO is limited to competitive or commercial injuries); *but see Canyon County v. Syngenta Seeds,*

Inc., 519 F.3d 969, 977-80 (9th Cir. 2008) (endorsing the *dicta* in *Town of West Hartford*).

The Second Circuit denied petitioners' petition for rehearing or, alternatively, for rehearing *en banc* by order entered October 30, 2008 (App. D, 171a-172a).[4]

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY DETERMINED THAT THE CITY HAS STANDING TO BRING A RICO CLAIM BASED ON DIRECT INJURY TO "BUSINESS OR PROPERTY" DUE TO FRAUDULENT BUSINESS SCHEMES DESIGNED TO DEPRIVE THE CITY OF TAX REVENUES AND RESULTING IN SUCH LOST TAXES.

THE CASES PETITIONERS RELY ON INVOLVE DIFFERENT FACTUAL BASES OF AMORPHOUS INJURIES SUCH AS ADDITIONAL PUBLIC EXPENDITURES OR LOST EMPLOYEE SALARIES.

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[4] The Circuit affirmed the dismissal of the state common law fraud claim, but certified two questions to the New York Court of Appeals as to the N.Y. York General Business Law § 349 and public nuisance claims (55a-62a). The argument is scheduled on May 5, 2009.

A. This Case is Not Certworthy.

Petitioners' primary argument is that the Circuit Courts are split as to whether state and local governments have RICO standing to recover loss of tax revenue as an "injury to business or property" (Pet., Pt. I). However, the Second Circuit's ruling in this case was correct and a proper application of the statute. Furthermore, the purported split of authority petitioners rely on essentially rests upon case law endorsing previous Second Circuit *dicta*, which has been repeatedly disavowed by the Court, and upon cases involving inapposite factual situations. In addition, the order appealed is interlocutory. For all these reasons, the issue is not certworthy.

Petitioners primarily rely on *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 458 (2008), which relied on *dicta* in the expressly-disavowed decision in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), as well as an unpublished opinion in *Michigan Dep't of Treasury v. Fawaz*, 653 F.Supp. 141 (E.D. Mich. 1986), *aff'd*, 848 F.2d 194 (6th Cir. 1988) (unpublished).

Canyon County was not only decided before the decision herein, but also it pointed to *dicta* in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), which was expressly disavowed in the instant case as well as previously (33a-34a, citing *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., supra*), for a commercial injury requirement for governments (Pet., p. 9). More crucially, in *Town of West Hartford*, the

Second Circuit simply never had occasion to address lost taxes, because lost taxes were never at issue in the case (*id.*, 915 F.2d at 98):

> The primary injuries caused to the plaintiff by the enterprise is the hinderance [sic] of normal routine police activities within the Town of West Hartford as well as the cost of increased manpower and equipment needed to respond to the illegal activities conducted by the enterprise within the Town of West Hartford.

Similarly, *Canyon County* involved very different factual circumstances, with the Ninth Circuit ruling that a governmental entity's expenditure of money to enforce laws or promote the public well-being does not constitute a "property" interest within the ambit of section 1964(c), particularly where the provision of additional public services is based on legislative mandates and intended to protect the public interest. *Canyon County*, 519 F.3d at 976. Accordingly, the Ninth Circuit rejected a county's claim against defendant companies who allegedly hired illegal aliens, thereby increasing the county's expenditures for law enforcement and publicly funded health care, holding that a government "does not possess a property interest in the law enforcement or heath care services that it provides to the public." *Id.* at 977.

Hemi also cites an unpublished Sixth Circuit opinion, *Michigan Dep't of Treasury v. Fawaz*, 653 F.Supp. 141 (E.D. Mich. 1986), *aff'd*, 848 F.2d 194,

1988 U.S. App. LEXIS 6206 (6th Cir. 1988) (unpublished).[5] In that case, the RICO complaint alleged that the defendant, an operator of a number of gasoline stations, mailed monthly sales tax returns, which underreported his gross income by $6 million, resulting in a tax underpayment of sales tax liability by $240,000. Prior to the RICO action, he was criminally prosecuted and convicted in state court and had already complied with court-ordered payment of restitution, plus interest. *Id.* at **2-3.

The Court held that the State was a person with RICO standing, but then found that applying the RICO statute to an individual sales tax cheater would not fit the purposes and intent behind the RICO statute to address the threat posed to the country's economy by organized crime, and also stressed that the State had already proceeded against the defendant taxpayer in the state criminal proceeding, which was unlike the situation in *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985). *Id.*, 1988 U.S. App. LEXIS 6206 at **3-6. In contrast, in this case, the allegations relate to an organized business scheme expressly intended to defraud the State and City from its ability to collect taxes on a mass basis, and which

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[5] At the time it was issued in 1988, the Sixth Circuit's practice was to discourage citation of unpublished opinions which were not recommended for publication. In 2007, following the enactment of Fed.R.App.P. 32.1(b), the Sixth Circuit rule was amended to permit citation of such opinions. Sixth Circuit Rule 28(g).

succeeds in so doing by impeding the ability to collect such taxes.

In this regard, petitioners' attempt to characterize this case as presenting a split of authority as to whether state and local governments can use RICO to "collect taxes" (Pet., p. 4) is unavailing. Rather, the instant RICO complaint is based on the well-recognized bases of mail and wire fraud. Petitioners did not owe the City taxes, rather, they defrauded the City out of an opportunity to collect taxes from those who did owe them.

In this respect, the injury to the City is no different than mail and wire fraud prosecutions by the United States of those who defraud governments of tax revenue, where losses of taxes are "property" for purposes of the mail and wire fraud statutes. *See, e.g., Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004) (taxes owed to governments, the object of defendant's scheme to defraud, are "property" within the meaning of the mail and wire fraud statutes); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (federal tax revenues), *cert. denied*, 510 U.S. 906 *and* 510 U.S. 1030 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 93-95 (2d Cir. 1991) (state income taxes), *cert. denied*, 502 U.S. 1091 (1992); *United States v. Dray*, 901 F.2d 1132, 1142 (1st Cir.), *cert. denied*, 498 U.S. 895 (1990) ("We think it obvious that a governmental agency is deprived of 'money or property' when persons attempt to evade, or divert, the payment of legally required fees and taxes."); *United States v. Porcelli*, 865 F.2d 1352, 1361 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989); *United*

States v. *Bucey*, 876 F.2d 1297, 1309-1310 (7th Cir.) (federal income taxes), *cert. denied*, 493 U.S. 1004 (1989); *DeFiore*, 720 F.2d at 761-62 (explaining that "four circuits before us have squarely applied the federal fraud statutes to state tax law violations") (citing, *inter alia*, *United States* v. *Brewer*, 528 F.2d 492, 496 (4th Cir. 1975) (scheme to sell cigarettes into another state without filing Jenkins Act reports is mail fraud)).

Petitioners suggest no basis why taxes owed to governments, which are the government's "property" for purpose of the mail and wire fraud statutes, should not constitute "property" for purposes of a RICO action alleging mail and wire fraud violations, just as the Circuit held. Moreover, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. *Cf. Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (holding that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute because Canada's right to uncollected excise taxes is "property" in its hands, but not expressing a view on the related question of whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under RICO for a scheme to defraud it of taxes).

Furthermore, petitioners' reliance on two district court decisions, *see Township of Marlboro v. Scannapieco*, 545 F.Supp.2d 452 (D.N.J. 2008) and *West Virginia v. Moore*, 895 F.Supp. 864 (S.D. W. Va. 1995) (Pet., p. 8) also demonstrates that the

proposed issue is not certworthy. In fact, similar to *Canyon County*, those cases involve not a tax owed to a governmental subdivision but rather substantially more amorphous claims. In *Marlboro*, the claimed injuries and losses included the total sum of all bribes, gratuities and profits illegally obtained and received by former Marlboro officials from various developers. *Marlboro*, 545 F.Supp.2d at 454-56. Citing, *inter alia*, the Second Circuit *dicta* in *Town of West Hartford*, the district court held that a governmental agency's allegations that it suffered amorphous injuries to a right to its employees honest services are not "concrete financial loss[es]" recoverable under RICO. *Id.* at 458-59.

In *West Virginia v. Moore*, 895 F.Supp. 864 (S.D. W.Va. 1995), the complaint against the State's former Governor Arch Moore rested on allegations that Moore accepted cash contributions in violation of state election laws and that he did not report the windfall on several tax returns. *Id.* at 867. The District Court accepted Moore's argument that the State suffered no injury to its business or property as a result of his alleged racketeering activity because his retention of a bribe payment, following a $2 million refund of Black Lung premiums which was legislatively passed, did not divert money from the State. The District Court also chose not to recognize the broader view that RICO encompasses salary payments to a corrupt employee. *Id.* at 868.

In sum, the decisions relied upon by petitioners do not undermine the persuasive rationale of the Second Circuit in this case, and

should not be considered a sufficient basis for finding that there is a conflict among the Circuits that must be resolved by this Court.

A final reason for denial is that the order is interlocutory, directing a remand for reinstatement of a complaint following a 12(b)(6) motion to dismiss and thus the case may be resolved on other grounds. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bagnor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967).

B. There is No Conflict with this Court's Precedent.

Petitioners' secondary argument is that the Circuit's decision conflicts with this Court's precedent, specifically *Anza, supra*, claiming that there is no proximate causation because the City allegedly is not a directly injured party (Pet. Pt. II, pp. 10-14). This issue is not framed in the petition's question presented, but, regardless, petitioners' argument lacks merit.

The Circuit's opinion recognizes that the predicate racketeering acts in this case are not Jenkins Act violations, but rather are the wire and mail fraud violations and that the City's injury is direct in the form of lost taxes (App. A. at 31a-32a). Although petitioners quote from the Circuit's detailed opinion on this issue (*id.*, pp. 11-12), they then rely on Judge Winter's dissent which characterizes the City as, "at best[,] an expectant gratuitous donee of information from the State" (App. A, 66a-67a).

However, the majority opinion correctly held to the contrary, aptly holding (26a):

> The principles outlined in [the Supreme Court] decisions, as applied to the City's allegations, support a finding that the City has standing. Comporting with *Sedima*, the City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations (the predicate acts of mail and wire fraud in furtherance of a scheme to defraud the City of taxes). *See Sedima* [*S.P.R.L. v. Imrex Co.*], 473 U.S. [479], 496 (1985). Any recoverable damages occurring by reason of a violation of § 1962(c) (a specific dollar amount for each pack of cigarettes sold without complying with the Jenkins Act) flow from the scheme to defraud the City of use taxes at the heart of the alleged predicate acts of mail and wire fraud. *See id.* at 497.
>
> The City's claims are easily distinguishable from the ones found to be insufficient in *Holmes*, 503 U.S. at 271. Specifically, unlike in *Holmes* where the plaintiff's injury was derivative, the City's alleged injury of lost tax revenue is directly caused by defendants' alleged schemes. That New York State may also have been injured by defendants' alleged schemes does not make the City's injury any less direct; the City is owed

> a certain amount of taxes independent of any amount owed to or collected by the State.

See also Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. ___, 128 S.Ct. 2131 (2008).

Finally, petitioners' argument is also belied by the record. First, as the Circuit noted, the State and City have entered into ongoing agreements for the administration and collection of cigarette taxes through the sharing of joint information (9a-10a & n 6). Petitioners' claim that such agreements represent the "State government deciding to exceed its constitutional authority and disseminate proprietary Jenkins Act information in ways that were never permitted by Congress" (Pet., p. 13) is a new and totally unsupported assertion.

Furthermore, while petitioners speculate that the collection of the taxes from the customers is an "intermediate contingenc[y]" (Pet., p. 13), that also is not borne out by the record. Although the District Court did not allow the City any discovery during the pendency of these actions, enough facts were established on this record during the pendency of the actions that dispelled any question of causation. In particular, the City showed that when it obtained Jenkins Act reports from Internet cigarette sellers, it was able to collect millions of dollars in cigarette taxes from City residents who had made Internet purchases (*see, e.g.*, Circuit Joint Appendix at A113, A594).

For all the above reasons, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
April 3, 2009

Respectfully submitted,

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REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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18 U.S.C. § 1961 *et seq.* ..... *passim*

REPLY BRIEF FOR PETITIONER

The City of New York's brief in opposition fails to confront the central issue presented by the divided court of appeals decision in this case: Whether government has standing under the Racketeer Influenced and Corrupt Organizations Act to seek recovery for non commercial injury. Unable to deny that a split in the circuits exists on this important issue, and ignoring this Court's interpretation of "business or property" under the Clayton Act (from which Congress adopted the term in the RICO statute), the City instead distorts the pertinent case law in an attempt to show that the Second Circuit panel's decision does not conflict with decisions in other circuits. The City does not contest that a uniform, national answer to this question is of vital importance, and instead merely argues that a writ of certiorari should not issue because of the City's desire to collect taxes (trebled under RICO) from parties who never owed the taxes to begin with.

I. The Decision Below Is In Conflict With Decisions In Other Circuits.

The Second Circuit's decision is in conflict with this Court's precedent, two other circuit courts, and district courts in an additional two circuits.[1] Respondent's

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[1] As noted in the petition, the Ninth and Sixth Circuit Courts of Appeal, and federal district courts in the third and fourth circuits have held state and local government do not have standing to bring non commercial claims, as did the Second Circuit in a case overruled by the instant decision. The Seventh and now the

primary distinction of the conflicting decisions in other circuits is the unfounded assertion that this split is somehow remedied because "the purported split of authority petitioners rely on essentially rests upon case law endorsing previous Second Circuit dicta." (Br. In Opp. at 12). Whether the Second Circuit's prior position that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") standing does not exist for government recovery of non commercial damages is dicta (which petitioners dispute) simply has no bearing on the conceded split in the circuits on the issue. Indeed, to the extent the divided Second Circuit panel's decision to reverse an earlier panel's holding has any bearing on the existence of a split in the circuits, it is only because it confirms the conflict on the issue within the Second Circuit itself, and underscores the lack of clarity on the issue which has led to the split within the circuits. Given the potency of the RICO remedy, this split on the "business or property" issue warrants review of the Second Circuit's decision on writ of certiorari. *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) ("[Civil RICO] is an unusually potent weapon – the litigation equivalent of a thermonuclear device").

Similarly, respondent's one sentence assertion, in passing, that a writ of certiorari should not issue because "the order is interlocutory" [Br. In Opp. at 18] ignores this Court's consistent practice of issuing writs of certiorari to consider such issues, even where the case below has been remanded by the circuit court or

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Second Circuit Courts of Appeal have ruled state and local government do have standing to bring such claims. (Petition at 4-8).

further proceedings are otherwise pending before the district court. *E.g., Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 128 S.Ct. 2733, 2751 (2008)(Ginsberg, J., concurring)(petition for writ of certiorari granted notwithstanding respondent's argument that issue appealed was interlocutory); *Scott v. Harris*, 550 U.S. 372, 376 (2007)(reversing Eleventh Circuit Court of Appeals decision affirming denial of summary judgment motion); *Hartman v. Moore*, 547 U.S. 250 (2006)(on writ of certiorari, reversing circuit court decision that remanded case to district court for further proceedings).

Indeed, if the City does not have standing, the district court does not have jurisdiction to hear the case, on remand or otherwise. As the issue goes directly to the jurisdiction of the federal courts, it should be decided now. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)("In its constitutional dimension, standing imports justiciability . . . . [Standing] is the threshold question in every federal case, determining the power of the court to entertain the suit"); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)(writ of certiorari granted to consider circuit court reversal and remand of district court grant of motion to dismiss).

The two cases cited by respondent are not to the contrary. One dealt not with denial of a petition for writ of certiorari, but instead confirmed that denial of a petition for writ of certiorari does not preclude later review of the issue by this Court. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)("It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree

that is sought to be reviewed.") The second case involved the situation, unlike here, where additional factual development was necessary before this Court could address the issue. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967)(denying petition as not ripe where case was remanded to district court "to consider whether there had in fact been a contempt" and if so, whether it was of a magnitude to warrant a coercive fine).

If RICO does not provide standing to governments to pursue non commercial losses, this case is at an end. Not only is it proper for this Court to resolve the split in the circuits and in doing so clarify this important RICO issue, it is important to do so now as resolution is likely to terminate the proceedings below. There is nothing to be gained by postponing review of the court of appeal's decision on RICO standing until the district court addresses factual issues that do not impact the pure issue of law sought to be reviewed. To the contrary, postponing review would only exacerbate the adverse consequences of the decision both within the circuits and for the parties in this case.

II. Mail And Wire Fraud Standing Is Not At Issue In This Petition.

Recognizing the weakness in the divided Second Circuit panel's decision to reverse an earlier panel and allow government non commercial losses to qualify as damages to "business or property" for RICO standing, respondent turns to criminal mail and wire fraud prosecutions to argue that certiorari is not appropriate in this case. Tellingly, however, in claiming there is no split in the circuits on the "business or property"

standing issue, respondent ignores this Court's decision addressing the definition of the phrase in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)(cited in petition at 6; ignored in response). In *Hawaii*, this Court ruled that the state of Hawaii lacked standing under the Clayton Act because the phrase "business or property" refers "to commercial interests or enterprises," and does not include loss of tax revenues. 405 U.S. at 264 ("When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act"). Unable to address this Court's specific holding in *Hawaii,* the City elected not to even cite the case in its response.

Instead, the City urges the court to turn to criminal mail and wire fraud prosecutions in which losses of taxes were treated as "property" for purposes of that federal criminal statute. Not only does the City's suggestion underscore the need for clarification by this Court of this important RICO standing issue, it ignores the source of the "business or property" language adopted by Congress in RICO. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 977 (9th Cir. 2008)("the Supreme Court has interpreted the statutory provision that served as a model for § 1964(c) to exclude claims for damages to governments' non - proprietary interests"), *cert. denied,* 129 S.Ct. 458 (2008); *see Beck v. Prupis*, 529 U.S. 494, 501-02 (2000)("Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind" (internal quotations and citation omitted)). Moreover, respondent's request that this Court rely on

criminal mail and wire fraud jurisprudence ignores the Court's precedent on this very question. *Beck v. Prupis*, 529 U.S. 494, 501 n. 6 (2000)(rejecting suggestion that in civil RICO matter the Court look to criminal, rather than civil, principles to interpret the statute). The City's suggestion also confirms a critical flaw in the decision petitioners ask this Court to review. As noted by Judge Winter in his dissent, "this case is a further major expansion of mail fraud doctrine by allowing suits against defendants who owed no duty to provide information to the plaintiffs." *City of New York v. Smokes-Spirits.com*, 541 F.3d 425, 440, 460 (2d Cir. 2008)(Winter, J., dissenting).

III. The Decision Below Is Inconsistent With This Court's Precedent.

The issue of the City's standing to bring a RICO claim is clearly framed by the question presented in the petition. As the Second Circuit itself recognized, to have standing, the City must allege it has suffered a direct injury. *City of New York v. Smokes-Spirits.com*, 541 F.3d 425, 440 (2d Cir. 2008)(*citing Sedima v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) for the proposition that causation is an element of standing). Respondent's assertion that the direct injury issue is not properly framed in the question presented by the petition (Br. In Opp. at 18) is without merit. See Br. In Opp. at 4 (recognizing that RICO standing requires both an injury to business or property and proximate causation of the injury "by reason of" the RICO violation).

As set forth in detail in the petition, because it has not alleged a direct injury as required by this Court's precedent, the City lacks standing, and this second

standing question provides additional grounds supporting issuance of a writ of certiorari in this case. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)(indirect claims do not confer RICO standing); *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992)(RICO standing is determined by proximate causation). Compare Br. In Opp. at 2 ("the City is unable to collect use taxes" and "[o]ut-of-state cigarettes sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes"). The City cannot allege a direct injury because petitioners owed no duty to the City upon which a direct injury could be based. Br. In Opp. at 3 ("information provided by out-of-state cigarette sellers to *state* taxing authorities under the Jenkins Act provides *states* the information necessary to collect the payment of cigarette taxes directly from the purchasers" (emphasis added)).[2] The only injury the City has alleged (Br. In Opp. at 2) is that it "is unable to collect use taxes owed" by its citizens; an indirect injury at best.

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[2] The response contains a number of incorrect assertions, most of which do not impact the merits of the issue raised by the petition for writ of certiorari. However, petitioners note that the assertion (Br. In Opp. at 3-4) that "Petitioners have never disputed that they concealed sales or failed to file Jenkins Act reports" is simply untrue.

CONCLUSION

For these reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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JOINT APPENDIX

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(4)

Supreme Court, U.S.
FILED
JUL 17 2009
OFFICE OF THE CLERK

No. 08-969

In The Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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July, 2009

Petition for Certiorari Filed January 27, 2009
Petition for Certiorari Granted May 4, 2009

005-4WDXL TC

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Relevant Docket Entries United States Court of Appeals for the Second Circuit ..... JA 15

18 U.S.C. § 1961 ..... JA 22

18 U.S.C. § 1962 ..... JA 26

18 U.S.C. § 1964 ..... JA 28

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Second Circuit Opinion, dated September 2, 2008 ..... 1a

Appendix B: District Court Opinion, dated March 15, 2006 ..... 70a

Appendix C: District Court Opinion, dated January 27, 2005 ..... 93a

Appendix D: Second Circuit Order, dated October 30, 2008 ..... 171a

RELEVANT DOCKET ENTRIES

United States District Court for the
Southern District of New York (Foley Square)

1:03-cv-00383-DAB

City of New York v. Nexicon, Inc., et al.

01/17/2003	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 461757. (gf) (Entered: 01/21/2003)
		* * *
01/28/2003	2	RICO STATEMENT by City of New York. (rec'd in the night deposit box on 1/28/03 at 5:03 p.m.) (sac) (Entered: 01/30/2003)
		* * *
02/14/2003	13	AFFIDAVIT OF SERVICE of Summons, Complaint and RICO Statement as to Hemi Group, LLC. by Bernadette Gachupin on 1/25/03. Answer due on 2/14/03 for Hemi Group, LLC. . (yv) (Entered: 02/26/2003)
		* * *
02/27/2003	18	AMENDED COMPLAINT by City of New York (Answer due 3/10/03 for Double B, for William C. Baker III,

for S4L Distibuting, for Dmitriy Zilberman, for Stephen F. Knopp, for Hooray's Inc., for Michael E. Smith, for Fred Teutenberg, for Brian Pereyra, for Hemi Group, LLC., for Daniel R. Urrea, for Richard A. Urrea, for Cyco.net, Inc.) amending [1-1] complaint against William J. Bevins, Fred Teutenberg; Summons issued. (djc) (Entered: 03/03/2003)

* * *

03/06/2003 23 Amended Rico Statement by City of New York. (jco)(Entered: 03/10/2003)

03/24/2003 24 STIPULATION of dismissal; that defendant Burt Newman is hereby dismissed with prejudice, without costs to any party as against the other. (signed by Judge Deborah A. Batts) (pl) (Entered: 03/24/2003)

* * *

05/09/2003 37 NOTICE OF MOTION by Hemi Group, LLC. and Kai Gachupin for an order purs. to FRCP 12(b)(3), to dismiss this action for improper venue , or in the alternative for an order to transfer the case to the District of New Mexico . No Return Date. (sb) (Entered: 05/13/2003)

05/09/2003 38 MEMORANDUM OF LAW by Hemi Group, LLC. and Kai Gachupin in support of [37-1] motion for an order

purs. to FRCP 12(b)(3), to dismiss this action for improper venue, [37-2] motion for an order to transfer the case to the District of New Mexico. (sb) (Entered: 05/13/2003)

* * *

05/28/2003 40 DECLARATION of Eric Proshansky by City of New York in opposition to: [37-1] motion for an order purs. to FRCP 12(b)(3), to dismiss this action for improper venue, [37-2] motion for an order to transfer the case to the District of New Mexico, [34-1] motion to dismiss the action for failure to state a claim on which relief can be granted, [30-1] motion to dismiss the Amended Complaint in its entirety with prejudice, [26-1] motion to dismiss for lack of jurisdiction, [26-2] motion to transfer this matter to the appropriate venue . (dle) (Entered: 06/04/2003)

05/28/2003 41 MEMORANDUM OF LAW by City of New York in opposition to [37-1] motion for an order purs. to FRCP 12(b)(3), to dismiss this action for improper venue, [37-2] motion for an order to transfer the case to the District of New Mexico, [34-1] motion to dismiss the action for failure to state a claim on which relief can be granted, [30-1] motion to dismiss the Amended Complaint in its entirety

with prejudice, [26-1] motion to dismiss for lack of jurisdiction, [26-2] motion to transfer this matter to the appropriate venue . (dle) (Entered: 06/04/2003)

06/03/2003 42 NOTICE OF MOTION by Hemi Group, LLC and Kai Gachupin for an order dismissing the amended complaint pursuant to FRCP 12(b)(6) and 9 (b) for failure to state claims on which relief can be grant[illegible] . Return Date not indicated. Memorandum in support attached. (dlc) (Entered: 06/09/2003)

* * *

06/13/2003 45 REPLY of Multistate Dfts in support of Motion to Dismiss. (db) (Entered: 06/17/2003)

06/16/2003 46 Memo-Endorsement on letter addressed to Judge Batts from John W. Rogers, dated 6/10/03; plaintiffs response to motion for 5/28/03 re: [30-1] motion to dismiss the Amended Complaint in its entirety with prejudice , defendants reply to response to motion set for 6/13/03 re: [30-1] motion to dismiss the Amended Complaint in its entirety with prejudice , granting defendants request for leave to file extra 10 page reply . (signed by Judge Deborah A. Batts); (pl) (Entered: 06/18/2003)

07/09/2003	47	ORDER: all initial disclosures and discovery are hereby stayed pending the resolution of the dfts' motions to dismiss presently before this Court. Pursuant to this Court's individual rules, the Court shall complete a scheduling order at a pre-trial conference called by the Court, if the motions are granted, after such time as all dfts have answered . (signed by Judge Deborah A. Batts) (db) (Entered: 07/10/2003)
12/05/2003	48	Second Amended Rico Statement. Document filed by City of New York. (jco,) (Entered: 12/19/2003)

* * *

01/27/2005	52	OPINION # 91163: for reasons further set forth in said order, the Court hereby DENIES defendants' motion to dismiss for lack of personal jurisdiction; DENIES defendants' motion to dismsiss for improper venue; and DENIES defendants' motion to transfer this action to Kentucky, Missouri, New Mexico or Virginia; GRANTS defendants' motions to dismiss for failure to state a claim based on the RICO statute, but GRANTS plaintiff leave to amend to replead the element of distinctness as required under RICO: GRANTS defendants ' motions to dismiss for failure to state a claim, based on

GBL 349 and GRANTS defendants' motions to dismsiss for failure to state a claim, based on common law fraud. (Signed by Judge Deborah A. Batts on 1/27/05) (db,) (Entered: 01/31/2005)

02/08/2005 53 SECOND AMENDED COMPLAINT amending 18 Amended Complaint, against City of New York.Document filed by City of New York. Related document: 18 Amended Complaint, filed by City of New York,.(cd,) (Entered: 02/15/2005)

02/08/2005 54 THIRD AMENDED RICO STATEMENT. Document filed by City of New York.(cd,) (Entered: 02/15/2005)

* * *

02/22/2005 55 ORDER; the Court is in receipt of plaintiff's request to lift the stay of discovery in this matter, and Defendants Cyco.net Inc and Hemi Group LLC's request opposing the lifting of said stay..... However, as in any civil lawsuit, the parties are free to agree uopn and to initiate discovery among themselves. This case is no exception. (Signed by Judge Deborah A. Batts on 2/16/05) (djc,) (Entered: 02/23/2005)

* * *

03/04/2005	59	ORDER; defendants are hereby ordered to show cause as to the bases, if any, for moving to dismiss the Second Amended Complaint in this case, within 10 days of the date of this Order. (Signed by Judge Deborah A. Batts on 3/1/05) (sac,) (Entered: 03/10/2005)

* * *

03/14/2005	62	MOTION for an Order pursuant to Rule 12(b)(1)(2) and (6) of the FRCP Dismissing the claims in the second amended complaint with prejudice, as it relates to defendants. Declarations of James M. Altman, Fred Teutenber, IV and Fred Teutenberg, V attached. Document filed by Fred Teutenberg, Fred Teutenberg. Received in night deposit box on 3/14/05 at 6:30 p.m. (yv,) (Entered: 03/18/2005)
03/14/2005	63	MEMORANDUM OF LAW in Support re: 62 MOTION to Dismiss. Document filed by Fred Teutenberg, Fred Teutenberg. Received in night deposit box on 3/14/05 at 6:30 p.m. (yv,) (Entered: 03/18/2005)
03/14/2005	64	RESPONSE re: 59 Order. Document filed by Fred Teutenberg, Fred Teutenberg. Received in night deposit box on 3/14/05 at 6:30 p.m. (yv,) (Entered: 03/18/2005)

03/24/2005 65 ORDER Defendants that have not yet done so are directed to file such motions, in compliance with Local Rule 6.1, by 3/31/05. Plaintiff shall have 30 days to respond to such motions, and defendants shall have 10 days to reply. So Ordered. (Signed by Judge Deborah A. Batts on 3/21/05) (jco,) (Entered: 03/28/2005)

* * *

03/31/2005 66 MOTION for an Order Dismissing this action pursuant to FRCP 12(b)(6) for failure to state a claim on which relief can be granted. Document filed by Kai Gachupin, Hemi Group, LLC. Return Date set for 4/22/2005 at 09:30 AM. (yv,) (Entered: 04/06/2005)

03/31/2005 67 MEMORANDUM OF LAW in Support re: 66 MOTION to Dismiss. Document filed by Kai Gachupin, Hemi Group, LLC. (yv,) (Entered: 04/06/2005)

03/31/2005 68 MOTION for an Order Dismissing this action pursuant to FRCP 12(b)(6) for failure to state a claim on which relief can be granted. Document filed by Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea. Return Date set for 4/22/2005 at 09:30 AM. (yv,) (Entered: 04/06/2005)

03/31/2005	69	MEMORANDUM OF LAW in Support re: 68 MOTION to Dismiss. Document filed by Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea. (yv,) (Entered: 04/06/2005)
04/14/2005	70	STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL, The action is hereby dismissed with prejudice as to defendant Stephen F. Knopp and Dmiitriy Ziberman only, without costs to any party. (Signed by Judge Deborah A. Batts on 4/12/05) (dt,) (Entered: 04/18/2005)
04/15/2005	71	Supplemental To Third Amended Rico Statement. Document filed by City of New York. (ae,) (Entered: 04/22/2005)
04/15/2005	72	MEMORANDUM OF LAW in Opposition to the Dirtcheap Defendants' Motion to Dismiss the Second Amended Complaint. Document filed by City of New York. (mde,) (Entered: 04/22/2005)
04/21/2005	73	MEMORANDUM OF LAW in Opposition re: 66 MOTION to Dismiss., 62 MOTION to Dismiss., 68 MOTION to Dismiss. Document filed by City of New York. (ae,) (Entered: 04/26/2005)
05/02/2005	75	BRIEF in Support re: 62 MOTION to Dismiss. Document filed by Fred Teutenberg, Dirtcheapcigs.com, Inc.,

		Fred Teutenberg. Received in the night deposit box on 5/2/05 at 5:50 p.m.. (sac,) (Entered: 05/06/2005)
05/03/2005	74	STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL, The action is hereby dismissed with prejudice as to defendant Michael E. Smith, d/b/a, without costs to any party. Smith unconditionally releases the City of New York and any person acting for the City from any and all claims arising or which may arise out of the Action. (Signed by Judge Deborah A. Batts on 5/2/05) (dt,) (Entered: 05/04/2005)
05/06/2005	76	REPLY of Defendants Hemi Group, LLC And Kai Gachupin In Support of Motion To Dismiss Second Amended Complaint For Failure to State A Claim On Which Relief Can Be Granted. Document filed by Kai Gachupin, Hemi Group, LLC.. (mde,) (Entered: 05/11/2005)
05/06/2005	77	REPLY of Defendants Nexicon, Inc., Richard and Daniel Urrea In Support of Motion To Dismiss Second Amended Complaint For Failure to State A Claim On Which Relief Can Be Granted. Document filed by Kai Gachupin, Hemi Group, LLC.. Document filed by Nexicon, Inc., Richard A. Urrea, Daniel R. Urrea. (mde,) (Entered: 05/11/2005)

03/13/2006	78	MEMORANDUM AND OPINION that for the reasons set forth in this opinion the court grants Dirtcheap dfts' motion to dismiss based on lack of subject matter jurisdiction; and hereby grants remaining dfts' motions to dismiss for failure to state a claim upon which relief may be granted as to the existence of any enterprise. The clerk is respectfully directed to close this case. (Signed by Judge Deborah A. Batts on 3/13/06) (dle,) (Entered: 03/15/2006)

* * *

03/15/2006	79	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion dated March 13, 2006, Dirtcheap defendants? motion to dismiss based on lack of subject matter jurisdiction is granted and the remaining defendants? motions to dismiss for failure to state a claim upon which relief may be granted as to the existence of any enterprise is granted; accordingly, the case is closed. (Signed by J. Michael McMahon, clerk on 3/15/06) (ml,) (Entered: 03/15/2006)
03/16/2006		Mailed notice of Right to Appeal re: 79 Clerk's Judgment, and to Attorney(s) of Record: Frederick W. Adkins, James M. Altman, Toby Michael John Butterfield, H. Patrick

Cline, Jr, Eric Proshansky. (rdz,) (Entered: 03/16/2006)

04/04/2006 80 NOTICE OF APPEAL from 79 Clerk's Judgment,, 78 Memorandum & Opinion,. Document filed by City of New York. Filing fee $ 255.00, receipt number E 574633. Copies of Notice of Appeal mailed to Attorney(s) of Record: Cowan, DeBaets, Abrahams & Sheppard, LLP andJames L Bikoff. (nd,) (Entered: 04/05/2006)

* * *

04/05/2006 Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 80 Notice of Appeal,. (nd,) (Entered: 04/05/2006)

06/27/2006 81 Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for 80 Notice of Appeal, filed by City of New York, USCA Case Number 06-1665-cv(L), 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (nd,) (Entered: 06/27/2006)

11/18/2008 82 MANDATE of USCA (Certified Copy) as to 80 Notice of Appeal, filed by City of New York, USCA Case Number 06-1665-cv(L), 06-1693-cv(CON), 06-1694-cv(CON), 06-1695-cv(CON). ON

CONSIDERATION THEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the District Court are VACATED and REMANDED as to the City's primary RICO claims as well as the alternative association-in-fact enterprise claim alleged against Nexicon in accordance with the opinion of this Court. The dismissal of the remaining RICO claims, the common law fraud claims in all cases, and the GBL § 349 claim in Smokes-Spirits is AFFIRMED. IT IS FURTHER ORDERED that the Court SEVERS and retains jurisdiction over the GBL § 349 claims in Nexicon and EZTobacco and over all the public nuisance claims. IT IS FURTHER ORDERED that the Clerk of the Court CERTIFY to the Clerk of the New York State Court of Appeals a question regarding whether the City has standing to sue under GBL § 349 and a question regarding whether the City may assert a common law public nuisance claim that is predicated on N.Y. Public Health Law § 1399-11. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 11/13/2008. (nd) (Entered: 11/18/2008)

* * *

02/19/2009	84	ORDER For the reasons set forth in this order, the conference scheduled for February 20, 2009 is hereby adjourned sine die. If the petition for a writ of certiorari is denied, the parties shall contact chambers and the conference will be rescheduled. (Signed by Judge Deborah A. Batts on 2/19/09) (mme) (Entered: 02/19/2009)

* * *

United States Court of Appeals
for the Second Circuit

06-1665-cv

City of New York v. Smokes-Spirit.Com, Inc.

4/6/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT City of New York, filed. [Entry date Apr 11 2006] [AM]
	* * *
7/10/06	APPELLANT City of New York, brief FILED with proof of service. [Entry date Jul 12 2006] [JP]
7/10/06	APPELLANT City of New York, Joint Appendix appendix filed w/pfs. (Volume # 1) [Entry date Jul 12 2006] [JP]
7/10/06	APPELLANT City of New York, Joint appendix filed w/pfs. (Volume # 2) [Entry date Jul 12 2006] [JP]
7/10/06	APPELLANT City of New York, special appendix filed(w/pfs) [Entry date Jul 12 2006] [JP]
	* * *
11/3/06	APPELLEE NCCigarettes.com, Nexicon, Inc., www.smokincheap.com, XFire Software LLC, ET AL , brief filed with proof of service. [Entry date Nov 8 2006] [JP]

11/3/06 APPELLEE Smokes-Spirit.Com, Inc., brief filed with proof of service. [Entry date Nov 8 2006] [JP]

* * *

11/6/06 APPELLEE Hemi Group, LLC., and Kai Gachupin brief RECEIVED. (Wrong Covers attorney will submit corrected briefs with right covers) [Entry date Nov 7 2006] [JP]

11/9/06 APPELLEE Hemi Group, LLC., Kai Gachupin, brief filed with proof of service. [Entry date Nov 28 2006] [JP]

12/5/06 APPELLANT City of New York, reply brief filed with proof of service. [Entry date Dec 20 2006] [JP]

* * *

1/7/08 Case heard before WINTER, STRAUB, SOTOMAYOR, C.JJ. CD Date: 1/7/08 [Entry date Jan 7 2008] [LY]

1/7/08 APPELLEE Somkes-Spirits.Com, Inc., 28(J) letter received. [Entry date Jan 8 2008] [TM]

1/9/08 APPELLANT City of New York, LETTER BRIEF filed with proof of service. [Entry date Jan 11 2008] [TM]

1/11/08 APPELLEE Smokes-Spirit.Com, Inc., Michael Klee, post argument letter brief filed. [Entry date Jan 14 2008] [AM]

1/15/08	APPELLEE C4LESS, LLC, Hemi Group, LLC., NCCigarettes.com, Nexicon, Inc., ET AL , post argument letter brief filed. [Entry date Jan 15 2008] [LY]
1/15/08	APPELLEE C4LESS, LLC, Hemi Group, LLC., NCCigarettes.com, Nexicon, Inc., ET AL , post argument letter brief filed. [Entry date Jan 16 2008] [LY]
6/9/08	APPELLANT City of New York, 28(J) letter received. [Entry date Jun 11 2008] [YS]

* * *

6/30/08	APPELLEE NCCigarettes.com, Nexicon, Inc., www.smokincheap.com, XFire Software LLC, ET AL , 28(J) letter received. [Entry date Jul 1 2008] [YS]
7/3/08	APPELLEE Smokes-Spirit.Com, Inc., 28(J) response letter dated 6/30/08, received. [Entry date Jul 3 2008] [ML]
9/2/08	Judgment of the district court is Affirmed in Part and Reversed/Vacated in Part by published signed opinion filed. (CJS) [Entry date Sep 2 2008] [YS]
9/2/08	Judge Winter dissents in part and concurrs in part in a separate opinion, filed. [Entry date Sep 2 2008] [YS]
9/2/08	Notice to counsel in re: opinion, dated 9/2/08 [Entry date Sep 2 2008] [YS]

9/2/08 Judgment filed. [Entry date Sep 4 2008] [YS]

9/2/08 Opinion filed, certifying the following question to the New York Court of Appeals: (1) Does the City have standing to assert its claims under General Business Law 349? (2) May the City assert a common law public nuisance claim that is predicated on N.Y. Public Health Law 1399-11? (CJS) [Entry date Sep 9 2008] [ML]

9/2/08 Certification to the New York Court of Appeals. [Entry date Sep 9 2008] [ML]

9/2/08 Order filed stating that the Clerk of this Court transmit to the Clerk of the New York Court of Appeals a Certificate, as set forth below, together with a complete set of briefs and appendices filed in this Court by the parties. [Entry date Sep 9 2008] [ML]

9/9/08 Acco transmitted to the New York State Court of Appeals. [Entry date Sep 9 2008] [ML]

9/9/08 Certified copy of the Certification issued to the New York Court of Appeals along with the brief, appendix and the record. (CJS) [Entry date Nov 12 2008] [ML]

* * *

9/16/08 Appellee Hemi Group, LLC., Appellee Kai Gachupin, et al Petition for rehearing en

banc filed with proof of service. [Entry date Sep 18 2008] [AM]

10/22/08 Letter dated 10/16/08 received from Stuart M. Cohen, Clerk of the Court for the State of New York, Court of Appeals, in re: accepting the certified question and the issues presented are to be considered after briefing and argument. [Entry date Oct 23 2008] [ML]

* * *

10/29/08 Letter received from State of New York Court of Appeals informing the USCA that the the certifed question has been accepted and the appeal will proceed in the normal course with full briefing and oral argument. [Entry date Nov 6 2008] [AM]

* * *

10/30/08 Order FILED DENYING Petition for rehearing by Appellee www.smokincheap.com, Appellee Vincent Klee, Appellee Jeff LeBlanc, Appellee Natalie Saalfeld, Appellee Nexicon, Inc., Appellee Richard Urrea, Appellee Brent Wolford, Appellee Daniel Urrea, Appellee Hemi Group, LLC., Appellee Brian Pereyra, Appellee Kai Gachupin, Appellee Theresa Justice, Appellee Theresa Trivett, Appellee Jeff Reinhardt, Appellee XFire Software LLC, Appellee NCCigarettes.com, Appellee Scott Herring, endorsed on petition dated 9/16/2008, Order FILED DENYING petition for rehearing en banc

by Appellee www.smokincheap.com, Appellee Vincent Klee, Appellee Jeff LeBlanc, Appellee Natalie Saalfeld, Appellee Nexicon, Inc., Appellee Richard Urrea, Appellee Brent Wolford, Appellee Daniel Urrea, Appellee Hemi Group, LLC., Appellee Brian Pereyra, Appellee Kai Gachupin, Appellee Theresa Justice, Appellee Theresa Trivett, Appellee Jeff Reinhardt, Appellee XFire Software LLC, Appellee NCCigarettes. com, Appellee Scott Herring, endorsed on petition dated 9/16/2008. (FP) [Entry date Oct 30 2008] [AM]

11/10/08 Errata sheet re: Page 426 Col. 1 Line 3, Page 431 Col. 2 Line 19, Page 431 Col. 2 Line 34, Page 432 Col. 1 Line 28, Page 432 Col. 1 Line 33, Page 432 Col. 1 Line 38, Page 432 Col. 1 Line 42, Page 434 Col. 2 Line 41, Page 434 Col. 2, Line 42, Page 435 Col. 1 Line 25, Page 435 Col 2 Line 17-18, Page 436 Col 1 Line 21, Page 437 Col. 1 Line 29, Page 437 Col. 2, Line 25, Page 438 Col. 1 Line 18, Page 438 Col. 1 Line 20, Page 438 Col. 1 Line 23, Page 439 Col. 2 Line 19, Page 440 Col 1 Line 44-45, Page 440 Col.2 Line 7, Page 447 Col. 2 Line 25, Page 449 Col. 2 Line 15, Page 450 Col. 1 Line 3, Page 451 Col. 2 Line 17, Page 451 Col. 2 Line 29-30,Page 453 Col. 1 Line 9, Page 454 Col. 1 Line 39, Page 456 Col. 2 Line 34, Page 457 Col. 2 line 14, filed. [Entry date Nov 10 2008] [EM]

11/10/08 Notice to counsel re: errata sheet filed 11/10/08. [Entry date Nov 10 2008] [EM]

11/13/08 Judgment MANDATE ISSUED. CLOSED [Entry date Nov 13 2008] [AM]

* * *

2/6/09 Notice of filing petition for APPELLEE Hemi Group, LLC., Kai Gachupin, dated 2/2/09 filed. Supreme Court #: 08-969. [Entry date Feb 9 2009] [AM]

3/13/09 Letter dated 3/5/09 received from New York State Court of Appeals in re: argument is scheduled for 5/5/09 @2:00p.m. [Entry date Mar 17 2009] [AM]

5/11/09 Letter dated 5/4/09 from the Supreme Court advising of order GRANTING petition for writ of certiorari by APPELLEE Hemi Group, LLC., Kai Gachupin, filed. (Supreme Court # 08-969) [Entry date May 12 2009] [AM]

5/11/09 Writ of Certiorari GRANTED. [Entry date May 12 2009] [AM]

* * *

6/30/09 Copy of state court opinion from State of New York Court of Appeals, dated June 9, 2009, stating : "certified questions answered in the negative." [Entry date Jun 30 2009] [DB]

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 U.S.C. § 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction

of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice [influencing or injuring officer or juror generally]), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons)[.], section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for

phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of

financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has

participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to

establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

PETITIONER'S BRIEF

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(5)

No. 08-969

FILED
JUL 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non-commercial injury resulting from non-payment of taxes by non-litigant third parties.

PARTIES TO THE PROCEEDINGS

Petitioners are parties in the federal district court proceeding captioned *City of New York v. Nexicon, Inc.*, No. 03 Civ. 383 (S.D.N.Y. filed Jan. 17, 2003). It is one of four consolidated cases that were before the Second Circuit Court of Appeals and included in the opinion on which this Court granted its writ of certiorari. Although the caption of the Second Circuit Court's opinion includes the parties to the original four lawsuits in the federal district court, most of those parties have, during the course of litigation, been dismissed from the proceedings. As noted by the Second Circuit Court of Appeals, *City of New York v. Smoke-Spirits.com, Inc.*, 541 F.3d 425, 432 n.3 (2d Cir. N.Y. 2008), the only remaining defendants on appeal of the consolidated cases were:

1. *City of New York v. Nexicon, Inc., et al., No. 03 Civ. 383 (S.D.N.Y. filed Jan. 17, 2003), appeal docketed, No. 06-1695-cv (2d Cir. Apr. 7, 2006)*

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Nexicon, Inc., formerly known as Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea, Hemi Group, LLC, and Kai Gachupin.

2. *City of New York v. Smokes-Spirits.com, Inc., et al.*, No. 04 civ. 6616 (S.D.N.Y. filed Aug. 16, 2004), *appeal docketed*, No. 06-1665-cv (2d Cir. Apr. 6, 2006) (lead case)

   Plaintiff-Appellant: City of New York.

Defendants-Appellees: Smokes-Spirits.com, Inc. and Michael Klee.

3. *City of New York v. A.E. Sales, LLC, Herring, doing business as Nccigarettes.com, et al.*, No. 03 Civ. 7715 (S.D.N.Y. filed Sept. 30, 2003), *appeal docketed*, No. 06-1693-cv (2d Cir. Apr. 7, 2006)

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Scott Herring, doing business as NCCigarettes.com, Jeff Reinhardt, Xfire Software, LLC.

4. *City of New York v. ESmokes, Inc., Theresa Justice, doing business as eztobacco.com and Theresa Trivett, et al.*, No. 03 Civ. 10091 (S.D.N.Y. filed Dec. 19, 2003), *appeal docketed*, No. 06-1694-cv (2d Cir. Apr. 7, 2006)

   Plaintiff-Appellant: City of New York.

   Defendants-Appellees: Theresa Justice, doing business as Eztobacco.com and Theresa Trivett.

By order entered November 18, 2008, the United States Federal District Court for the Southern District of New York, upon stipulation of counsel for the City of New York and Smokes-Spirits.com, dismissed Smokes-Spirits.com from the second action listed above. In the stipulated order, counsel for New York City represented that it has resolved its claims against Michael Klee. (*Case 1:04-cv- 06616-DAB* Document 25)

RULE 29.6 STATEMENT

The corporate disclosure statement at page iv of the Petition for Writ of Certiorari remains accurate.

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OPINIONS BELOW

I. Federal Court Opinions.

The decision of the United States Court of Appeals for the Second Circuit is reported at 541 F.3d 425 (2nd Cir. 2008). Petitioners' Motion for Rehearing En Banc was denied by the Second Circuit Court of Appeals on October 30, 2008 (Appendix to Petition for Writ of Certiorari ("Pet. App.") D, 171a-172a). Petitioners' case below was one of four consolidated cases. The relevant U.S. District Court, Southern District of New York opinions are:

1. *City of New York v. Nexicon, Inc.*, (Pet. App. B, 70a-92a) which is unofficially reported at 2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. March 13, 2006); and

2. *City of New York v. Cyco.net, Inc.* (Pet. App. C, 93a-170a) reported at 383 F. Supp. 2d 526 (S.D.N.Y. 2005).

II. State of New York Court of Appeals' Opinion.

In its decision, the Second Circuit Court of Appeals certified two state law questions to the State of New York Court of Appeals. 541 F.3d at 458. The State of New York Court of Appeals accepted the certified state law questions on October 16, 2008. *City of New York v. Smokes-Spirits.com*, 11 N.Y. 3d 800; 897 N.E. 2d 1061; 868 N.Y.S. 2d 580 (2008). On June 9, 2009, the New York State Court of Appeals issued its decision on the state law questions, unanimously holding: (1) that the City of New York's alleged damages are derivative and therefore the City lacks standing to bring a state

law consumer claim under New York General Business Law § 349; and (2) that the City cannot assert a common law public nuisance claim predicated on N.Y. Public Health Law § 1399-II. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699, (N.Y. June 9, 2009).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision on September 2, 2008, and denied a motion for rehearing en banc on October 30, 2008. Petitioners filed their petition for writ of certiorari on January 27, 2009, which this Court granted on May 4, 2009. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The relevant sections of those statutory provisions, 18 U.S.C. §§ 1961, 1962 and 1964, are reproduced at Joint Appendix ("JA") 22-29.

STATEMENT OF THE CASE

I. Background Facts and Issues.

The Hemi Group, LLC, and Kai Gachupin are two of eleven defendants named by the City of New York ("City") in a second amended complaint raising federal RICO claims and certain state law causes of action

(2nd Cir. Ct. App. Jt. Apx. A1007). Three of the defendants were unrelated companies that sold cigarettes on the Internet. The remaining defendants, individual natural persons, did not sell cigarettes on the Internet, nor did the City specifically allege that they had done so. In three separate contemporaneous actions, the City sued other defendants making similar allegations. The federal district court consolidated the four cases.

To support its RICO claim, the City alleged that each defendant participated in a scheme to defraud New York City of tax revenues by concealing from New York State tax administrators Internet sales of cigarettes to New York City residents, primarily by an alleged failure to file Jenkins Act reports with the State of New York.[1]

II. Decisions of the District Court.

Following the filing of the City's first amended complaint (2nd Cir. Ct. App. Jt. Apx. A889), the district court denied motions to dismiss based on improper venue and personal jurisdiction, and granted motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim under: (1) New York's General Business Law § 349; (2) public nuisance predicated on New York Public Health Law § 1399-II; and (3) common law fraud. The federal district court also granted the defendants' motions to dismiss for failure to state a RICO claim, with leave to file a second amended complaint (2nd Cir. Ct. App. Sp. Apx.

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[1] 15 U.S.C. § 375 *et seq.*, Pub. L. No. 81-363, 63 Stat. 884, 1949 U.S.C.C.A.N. (63 Stat.) 894.

A1136). The City filed a second amended complaint, which the federal district court subsequently dismissed upon motion of the defendants, again pursuant to *Fed. R. Civ. P. 12(b)(6)* (2nd Cir. Ct. App. Sp. Apx. A1256).

III. Decision of the Second Circuit Court of Appeals.

The City appealed both district court orders which together dismissed the City's complaints in their entirety. In a 2-1 decision, the Second Circuit Court panel vacated and remanded in part with respect to the RICO claims, affirmed the dismissal of the state common law fraud claim, and certified to the New York Court of Appeals the two remaining state law claims. Judge Winter dissented as to the civil RICO claims, reasoning that under controlling Supreme Court precedent, the City lacked standing to sue under RICO. He concurred in the disposition of the State law claims. In its decision, the Second Circuit Court of Appeals rejected an earlier Second Circuit Court of Appeals decision specifically holding that RICO's requirement of injury to business or property did not include non-commercial losses to a municipality. The Second Circuit Court of Appeals denied petitioners' request to review the panel's decision en banc. This Court granted certiorari. *Hemi Group, LLC v. City of New York*, 129 S. Ct. 2159 (2009).

IV. Decision of the State of New York Court of Appeals.

As noted, in addition to deciding the federal law issue now before this Court, the Second Circuit Court of Appeals certified two state law questions to the New

York Court of Appeals. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 458 (2d Cir. 2008)("We retain jurisdiction over those [two certified state law] claims pending the New York Court of Appeal's disposition"). This Court issued its writ of certiorari to the Second Circuit Court of Appeals the day before argument was scheduled before the New York State Court of Appeals on the two certified state law questions.

The New York Court of Appeals, by faxed letter, instructed counsel to "be prepared to address at argument any implications arising from today's grant of certiorari by the Supreme Court of the United States to Hemi-Group LLC and Kai Gachupin." At argument, counsel for the City of New York and the petitioners both confirmed their position that this Court's writ did not affect the authority of the State Court to determine the two certified state law questions. Thereafter, the parties submitted letters to the court on the issue. In its letter, the City of New York referred to the "necessity" for the Court of Appeals to decide the state law issues and expressed the view that because this Court's resolution of the federal issue would not decide the two certified state law issues, the New York Court of Appeals should proceed. In their letter, the Hemi Group and Kai Gachupin did not object to the New York Court of Appeals proceeding to determine the two certified state law questions, and cited the following cases as providing guidance on the issue: *Waskey v. Hammer*, 179 F. 273 (9th Cir. 1910)(because writ of certiorari is in effect a supersedeas, it suspends the execution of, but does not vacate, the order being challenged); *Orth v. Steger*, 258 F. 625, 626 (S.D.N.Y. 1919)(granting stay pending resolution of petition for writ of

certiorari, noting that if petition were to be granted it would act as a stay of proceedings, "unless the judgment or order complained of has begun to be executed." (citation omitted)); *McCurry v. Allen*, 688 F.2d 581, 587 (8th Cir. 1982)(holding statute of limitations was not tolled by Supreme Court's grant of petition for writ of certiorari as "filing of an amended complaint would have been in no way incompatible with the Supreme Court's review" of other issue); *Brewer v. Quarterman*, 474 F.3d 207 (5th Cir. 2006) *rev'd* 550 U.S. 286 (2007)(Dennis, J., dissenting) (lengthy dissent criticizing panel's decision to act on pending motion for reconsideration *en banc* notwithstanding United States Supreme Court's issuance of writ of certiorari).

Following presentation of argument to the court, on June 9, 2009, the New York State Court of Appeals issued its decision on the state law questions. The New York Court of Appeals unanimously held on the first question that the City of New York's claimed injury is "entirely derivative of injuries" to others, and that therefore the City lacks standing to bring a state law consumer claim under New York General Business Law § 349. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699 at 6, (N.Y. June 9, 2009).

The New York State Court of Appeals also answered the second certified question in the negative, holding that the City cannot assert a common law public nuisance claim predicated on N.Y. Public Health Law § 1399-II. *Id.* at 11.

SUMMARY OF ARGUMENT

Standing to bring a civil RICO claim is limited to "any person injured in his business or property by reason of a violation of" RICO's criminal prohibitions. 18 U.S.C. § 1964(c) (JA 25-26); *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985)("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property. . . ."). In the case before this Court, New York City claims to have RICO standing based on its alleged inability to collect taxes owed by non-litigant third parties. *E.g.*, City of New York Br. Opp'n to Petition for Writ of Certiorari at 15 ("Petitioners did not owe the City taxes, rather, they defrauded the City out of an opportunity to collect taxes from those who did owe them"); *City of New York v. Smoke-Spirits.com, Inc.*, 541 F.3d 425, 432-33 (2d Cir. 2008)("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes."); *cf. Miller Bros., Co. v. Maryland*, 347 U.S. 340, 346 (1954)("It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself").

At its core the City's complaint is that the Hemi Group and other defendants made it more difficult for the City to carry out one of the City's most basic sovereign functions – tax collection. However, the City does not have standing to bring this claim because damage to a sovereign interest is not "injury to business or property" and therefore is not cognizable under RICO. Specifically, failure to collect taxes owed by non-litigant third parties: (1) is not an "injury to business" under RICO; (2) is not an "injury to property" under RICO; (3) does not provide standing

because a municipality is not a "person" under RICO when pursuing injury to its sovereign interests; and (4) is not a proximate injury, but rather indirect and too speculative to support a civil RICO claim.

ARGUMENT

I. Introduction.

The power of taxation is an incident of sovereignty and not a property right. *Case of the State Freight Tax*, 82 U.S. 232, 278 (1873)("A tax is a demand of sovereignty; a toll is a demand of proprietorship. . . . [A state] may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach").

This concept was well established when Congress enacted RICO and in doing so limited the class of plaintiffs who can access RICO's potent civil remedies to "any person injured in his business or property by reason of a violation" of the Act's criminal prohibitions. 18 U.S.C. § 1964(c) (JA 25-26). In addition to the common law meanings of the individual words "business" and "property," when enacting RICO Congress had available and drew upon a history of the phrase "business or property" dating to the late 1800s when Congress first combined those words as a standing requirement in antitrust law.

Not only is injury to a city's ability to collect taxes owed by non-litigant third parties too remote to recover under RICO, the historic context in which Congress adopted the "injury to business or property" standing limitation confirms that the limitation

excludes standing for a municipality alleging injury to its sovereign interests.

II. RICO's "Injury to Business or Property" Limitation Precludes Recovery for Injury to a Sovereign Tax Collection Interest.

A. The historic context and legislative history of RICO's "injury to business or property" limitation confirms its restrictive significance.

RICO's requirement that one be "injured in his business or property" to have standing under the Act was taken by Congress directly from the Sherman and Clayton Antitrust Acts.[2] *Agency Holding Corp. v. Malley-Duff & Assoc.'s Inc.*, 483 U.S. 143 (1987)(RICO's legislative history reveals that Congress relied on the Clayton Act model); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (discussing RICO's roots in antitrust law).[3] The civil remedy provision in RICO Section 1964(c) and its limiting standing requirement were amended into the pending legislation to "make applicable those provisions granting antitrust type remedies to deal with

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[2] 15 U.S.C. §§ 1-7 (1890) and 15 U.S.C. § 12-27 (1914), respectively; *see* 91 Cong. Rec. 116, 25190 (July 21, 1970); 91 Cong. Rec. 116, 27738 (Aug. 6, 1970) (statement of Rep. Steiger); 91 Cong. Rec. 116, 35227 (Oct. 6, 1970) (statement of Rep. Steiger); 91 Cong. Rec. 116, 35295 (Oct. 7, 1970) (statement of Rep. Poff).

[3] There is extensive discussion of RICO's legislative history in Justice White's decision, and the dissents of Justice Marshall and Justice Powell, in *Sedima*.

organized crime, the parallel private anti-trust type remedies available now to private persons under the anti-trust law."[4] The amendment was described as "a provision authorizing private damage suits based upon the concept of Section 4 of the Clayton Antitrust Act."[5]

Where, as here, "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When borrowing terms for use in a statute, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Additionally, when Congress adopts language in a setting where the courts have defined the adopted concept, "it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 813 (1989). As Justice Souter noted in addressing Congress' reliance on antitrust law when it adopted RICO:

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[4] 91 Cong. Rec. 116, 27738 (Aug. 6, 1970) (statement of Rep. Steiger).

[5] 91 Cong. Rec. 116, 25190 (July 21, 1970).

> [C]ongressional use of the [Sherman Act] § 7 language in § 4 [of the Clayton Act] presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation,' . . . The reasoning applies just as readily to § 1964(c). We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's §4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. Sec. Investor Prot. Corp., 503 US 258, 268 (1992) *citing Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983); *see Beck v. Prupis*, 529 U.S. 494, 504 (2000)("Congress meant to incorporate common-law principles when it adopted RICO."); *see also Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2140 (2008)(noting the general "presumption that Congress intends to adopt the settled meaning of common-law terms" in RICO).

In October 1970, when Congress passed its RICO legislation, "sovereign interests" were not understood to be included in the phrase "business or property" for antitrust standing purposes. Indeed, one month earlier, in September 1970, the Ninth Circuit Court of Appeals entered its decision in *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), which this Court subsequently affirmed. 405 U.S. 251 (1972). In its decision, the Ninth Circuit Court of Appeals held that even if Hawaii's general economy could suffer an injury from antitrust violations independent of the injuries suffered by private persons or by the state in

its proprietary role, "[a]n injury to the general economy of the state is not an injury to the business or property of the state or its people." 431 F.2d at 1285. In so holding, the court reasoned that, "[u]nless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly." *Id.*

This Court affirmed the Ninth Circuit Court of Appeal's decision, ruling that the State of Hawaii lacked standing under the Clayton Act because the phrase "business or property" refers "to commercial interests or enterprises," and does not include damage to sovereign interests. *Hawaii*, 405 U.S. at 264. In discussing the need for explicit statutory language to support the conclusion that standing exists to recover damages for sovereign interests, Justice Marshall, writing for the majority, stated:

> Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.

405 U.S. at 264. The Ninth Circuit Court of Appeals, addressing the same considerations in RICO, noted:

> Congress could have used its powers to do so, enabling local governments to pursue treble damages under RICO for injuries arising from their provision of governmental services. But had Congress intended such a result, we believe that Congress would have been more explicit; the term "business or property" does not readily connote a government's interest in the services it provides in its sovereign or quasi-sovereign capacity.

Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 980 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008).

In *Hawaii*, this Court reviewed the legislative history of the phrase "business or property" as it is used in § 15(a) of the Clayton Act (the provision that allows the United States to recover for damages to its "business or property"). In doing so, the Court stated, "[t]he legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services." *Id.* at 265. The Court found that "[i]n light of the language used as well as the legislative history of 15 U.S.C. § 15(a), it is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions. And the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State."

Id.[6] The Court recognized that, "[i]n enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected." *Id.* at 262.

Seven years later this Court again confirmed that, as used in the Clayton Act, "[t]he phrase 'business or property' also retains restrictive significance." *Reiter v. Sonotone Corp*, 442 U.S. 330, 339 (1979). Chief Justice Burger, writing for a unanimous Court, again discussed the legislative histories of Section 4 of the Clayton Act and its predecessor, Section 7 of the Sherman Act.[7] In doing so he noted that the legislative history of the Sherman Act revealed that Congress designed the Act as a consumer welfare prescription, and that Section 4 of the Sherman Act is primarily a remedy for the people of the United States as individuals, especially consumers. *Id.* at 343.[8]

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[6] *See also Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)("§ 4 [of the Clayton Act] plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm").

[7] Justice Rehnquist writing in concurrence stated: "I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase 'business or property.'" 442 U.S. at 346 (Rehnquist, J., concurring).

[8] Section 7 of the Sherman Act, as originally introduced authorized "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination" to sue for damages thereby sustained." *Reiter*, 442

B. Antitrust case law guides RICO interpretation.

This Court consistently has looked to the Clayton Act for guidance when addressing RICO issues. For example, in *Holmes*, 503 U.S. at 272, Justice Souter writing for the majority referred to the Clayton Act's proximate cause requirement in holding that a RICO plaintiff must have suffered a direct injury in order to have RICO standing. The Court rejected the notion that RICO provides standing to all parties able to demonstrate that a defendant's violation was a "but for" cause of the party's injury. In doing so, the Court noted the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover . . . ." *Id.* at 266. *See also Anza*, 547 U.S. at 477 (Thomas, J., dissenting in part)("We also decided *Holmes* in light of Congress' decision to use the same words to impose civil liability under RICO as it had in § 7 of the Sherman Act, 26 Stat. 210, into which federal courts had implied a proximate-cause limitation").

Similarly, in *Agency Holding Corp. v. Malley-Duff & Assoc's Inc.*, 483 U.S. 143, 150 (1987), Justice O'Conner writing for the Court analogized to the Clayton Act in holding that a uniform statute of limitations exists for civil RICO claims. In doing so, Justice O'Conner recognized that, "[t]he close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" *Id.* at 151

U.S. at 343 n.5. Prior to passage, Congress changed the standing requirement by substituting the phrase "business or property" for the language originally proposed.

quoting Sedima, 473 U.S. at, 489. *See also Anza*, 547 U.S. at 457 (discussing RICO's roots in antitrust law and confirming that RICO was not meant to allow all factually injured plaintiffs to recover).

Antitrust precedent confirms that injuries to sovereign interests fall outside the "zone of interest" Congress sought to protect, and outside the range of injuries that Congress included as cognizable under RICO.[9] As stated by Justice Marshall in writing for the majority in *Hawaii*: "When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act." *Hawaii*, 405 U.S. at 264; *accord Reiter*, 442 U.S. at 339 (in the antitrust laws, "[t]he phrase 'business or property' also retains restrictive significance. . . . Congress must have intended to exclude some class of injuries by the phrase 'business or property.'").

The Circuit Courts of Appeals have relied upon and applied the antitrust analysis in both *Hawaii* and *Reiter* to RICO standing issues, using both as support in denying standing for plaintiffs alleging certain classes of RICO injury. For example, last year the Ninth Circuit Court of Appeals held that RICO's "injury to business or property" standing requirement excludes a state's claim for damages based on injury to

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[9] *Holmes*, 503 U.S. at, 287 (Scalia, J., concurring in the judgment)("another element of statutory standing is compliance with what I shall call the 'zone-of-interest' test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue.").

the state in its sovereign or quasi-sovereign capacity. *Canyon County*, 519 F.3d at 978-979. In so holding, the court acknowledged that the Supreme Court has interpreted the model Clayton Act provision to exclude these same types of claims, citing this Court's decision in *Hawaii*. Similarly, in *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) the court affirmed dismissal of the City's RICO claim seeking costs of police and other emergency services. In doing so, the court recognized:

> *Hawaii* refers not only to injuries to a governmental entity's "general economy," but also to its "ability to carry out its functions," as falling outside the concepts of statutory injury to its "business or property." The subsequent gloss in *Reiter v. Sonotone*, allowing a governmental entity to recover for such injury only when it functions "as a party to a commercial transaction," makes the point even clearer. Injuries of the sort asserted by the Town do not fall within the ambit of section 1964(c).

915 F.2d 92, 104 (2d Cir. 1990) (citations omitted).

Circuit Courts of Appeals have relied on this Court's antitrust precedent to reject RICO-based personal injury claims. *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir. 2006); *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (*en banc*). Similarly, the Third Circuit Court of Appeals relied on this Court's antitrust precedent in rejecting a RICO claim based on lost opportunity to bring a state law personal injury claim. *Magnum v. Archdiocese of Phila.*, 253 Fed. Appx. 224 (3d Cir. 2007).

This Court has itself recognized that personal injuries ("injury to person") are not cognizable under the Clayton Act as they are not "injury to business or property." *Reiter*, 442 U.S. at 339 ("The phrase 'business or property' also retains restrictive significance. It would, for example, exclude personal injuries suffered").[10] Similarly, "injury to government *qua* government" is not "injury to business or property" and cannot provide the requisite injury necessary for RICO standing.

C. A sovereign interest in uncollected taxes owed by non-litigant third parties is neither "business" nor "property."

1. The phrase "business or property" must be read in the disjunctive.

As this Court held in *Reiter*, 442 U.S. at 338-39, the disjunctive "or" in the phrase "business or property" in the Clayton Act requires both "business" and "property" to be given their independent and ordinary significance. In so holding, the Court noted that "Congress' use of the word 'or' makes plain that 'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'" *Id.* at 339. *See United States v. Menasche*, 348 U.S. 528, 538-539 (1955)(the courts are obliged to give effect, if possible, to every word Congress used); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-740 (1978) *reh'g denied*, 439 U.S. 883 (1978)(canons of construction suggest that terms connected by a disjunctive be given

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[10] *See also* cases collected by the Court in *Hawaii*, 405 U.S. at 262 n.4.

separate meanings, unless the context dictates otherwise). That same analysis applies to the identical language Congress adopted from the Clayton Act into RICO.

2. Uncollected taxes owed by third parties are not an injury to business.

Federal courts consistently have held that the word "business" as used to limit standing under both the antitrust acts and RICO is more restrictive than the word "property" and applies solely to economic and commercial interests. For example, in *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) the Seventh Circuit Court of Appeals held that a sales agent's loss of his exclusive sales territory was an injury to his business sufficient to support his claims under the Clayton Act. In so holding, the court stated:

> We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, - persistent human efforts which have for their end pecuniary reward. It denotes "the employment or occupation in which a person is engaged to procure a living."

125 F.2d at 419 (citation omitted); *cf. Bridge*, 128 S. Ct. at 2139 (where business competitors lose money as

a result of misrepresentation, "it would certainly seem that they were injured in their business").

This Court in *Reiter* cited with approval *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964) for the proposition that the phrase "business or property" "retains restrictive significance."[11] In *Waldron*, the court held that "business" is a more restrictive term than "property" as those words are used to limit standing in the antitrust laws. The plaintiff in *Waldron* was a party to a contract that gave him certain oil importation rights. In his lawsuit, he alleged that an illegal conspiracy prevented his importation of the oil. Because his enterprise was only potential, the court found that no "business" existed within the meaning of the Clayton Act. 231 F. Supp. at 86. However, the court did find that the plaintiff had been injured in his "property." *Id.* at 87. In doing so, the court recognized that, "[t]he word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'" *Id.* at 86; *accord Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906)(upholding right of municipality to bring action under antitrust law where the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe").

Moreover, and in direct relation to RICO's "injury to business" requirement, perhaps nowhere is the threat to American business warned against by Justice Breyer in his concurring opinion in *Anza* more

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[11] 442 U.S. at 339.

apparent than in the context of this case. *Anza*, 547 U.S. at 479 (Breyer, J., concurring in part and dissenting in part). Here, a municipality seeks to use RICO to collect taxes from a business that offered lower prices and better distribution through the Internet. Yet the taxes the municipality wants to be paid were never owed by that business. Instead they were owed, if at all, by non-litigant third party customers. In his concurring opinion in *Anza,* Justice Breyer discusses at length the legal principles encouraging businesses to compete, and then goes on to explain that:

> [T]hese principles suggest that RICO does not permit private action based solely upon this competitive type of harm, *i.e.*, harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's "proximate-cause" requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm is not "direct."

547 U.S. at 482-483. *Cf. Beck*, 529 U.S. at 505 (injury caused by an act that is not itself wrongful is not actionable under RICO).

In the case now before this Court, petitioners offered lower prices to consumers and easy distribution through Internet sales. There were no sales taxes or

tobacco taxes on these purchases.[12] However, New York City *consumers*, once possessing and using the product they had purchased over the Internet, owed a tax obligation to New York City.[13] Now New York City wants to collect those taxes, trebled no less, from a business that never owed them in the first instance. As recognized in *Miller Bros. Co.*, 347 U.S. at 346, "[i]t would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself."

New York City's alleged inability to collect taxes, having nothing to do with its participation in a commercial venture or enterprise, does not qualify as an injury to "business," and does not provide the City standing to pursue its RICO claims in this case.

3. Uncollected taxes owed by third parties are not an injury to property.

The power of taxation is an incident of sovereignty and not a property right. *Case of State Freight Tax*, 82 U.S. 232, 278 (1873)("A tax is a demand of sovereignty; a toll is a demand of proprietorship"); *accord Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982)(an Indian tribe's power to tax does not arise from its power to exclude non-Indians from its land, but instead "is a fundamental attribute of sovereignty

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[12] *City of New York*, 541 F.3d at 432-33 ("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes").

[13] The City's tax regulation could hardly be more emphatic: "It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y.C. Admin. Code § 11-1302(a)(3).

. . . .").[14] Because the power of taxation is not a property right, a municipality's failure to collect taxes allegedly owed by non-litigant third parties is at best an injury to a sovereign interest, and not an injury to "property" for purposes of RICO standing. *Canyon County*, 519 F.3d at 977 (injury to sovereign interests is not "injury to business or property" and therefore not cognizable as a civil RICO claim, recognizing that "the ordinary meaning of the term 'property' does not include the interests of local governments in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well being of the public").[15]

This Court in *Reiter* recognized that "in its dictionary definitions and in common usage 'property' comprehends anything of material value *owned or possessed*." *Reiter*, 442 U.S. at 338-39 (emphasis supplied)(declining to limit the word "property" in the Clayton act solely to "business" interests). This "owned or possessed" limitation on the word "property" as used in RICO is confirmed in RICO's definition of "person" as "any individual or entity capable of holding

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[14] *See also* Thomas M. Cooley, *Law of Taxation* at 7 (Gallaghan and Co., 3d Ed. 1903)("The power of taxation is an incident of sovereignty . . . .").

[15] *See also Town of W. Hartford* 915 F.2d at 104 (where a municipality sues under RICO, it must allege injury to its business or property in its capacity as a party to a commercial transaction because allegations that a municipality is seeking to vindicate its interest in the general economy or in its ability to carry out its functions do not state a claim under RICO).

a legal or beneficial interest in property." § 1961(3)(JA 22).[16]

Because the sovereign interest in collecting taxes is not something "owned or possessed," an impairment of that sovereign interest is not an injury to "property" and therefore cannot provide RICO standing. *State v. Barclays Bank of N.Y., N.A.*, 76 N.Y.2d 533, 540-541 (1990)(where taxpayer's accountant misappropriated checks payable to State of New York for payment of state taxes, "the checks were never actually or constructively delivered to plaintiff [State of New York], it, therefore never acquired a property interest in them and cannot be said to have suffered a loss"). *See also Michigan, Dep't. of Treasury v. Fawaz*, No. 86-1809, 1988 U.S. App. LEXIS 6206 (6th Cir. May 19, 1988)(rejecting state RICO claim in tax collection case where state was "asking [the Court of Appeals] to designate the district courts as collection agencies for unpaid state taxes, presumably because [the state] can there pursue treble damages"); *West Virginia v. Moore*, 895 F. Supp. 864, 872 (S.D. W. Va. 1995)(dismissing RICO claim seeking to recover lost tax revenue, stating: "Even if it were determined that [the defendant] owed additional tax, the Court is not convinced that civil RICO is an appropriate method for the State to use in recouping that loss"); *cf. Township of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452, 459 (D.N.J. 2008)(dismissing RICO claim by a governmental agency based on losses suffered when Township employees accepted bribes, concluding the

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[16] *See Brown v. Gardner*, 513 U.S. 115, 118 (1994)(recognizing the "presumption that a given term is used to mean the same thing throughout a statute").

Township "failed to allege an injury to its business or property such that it may maintain a civil RICO cause of action").

Moreover, and as the City readily concedes, the City's alleged injury here is not to the public fisc, but instead is an alleged injury to an "opportunity" the City claims it would have had to collect taxes from other, non-litigant parties. *E.g.*, City of New York Br. Opp'n to Petition for Writ of Certiorari at 15 ("Petitioners did not owe the City taxes, rather, they defrauded the City out of an opportunity to collect taxes from those who did owe them"). *See City of New York*, 541 F.3d at 432-33 ("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes"). The "opportunity to collect taxes from those who did owe them," falls within a class of "expectation" interests that do not qualify as injury to "business or property" and therefore do not confer civil RICO standing. *E.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008)("the rule of general unavailability follows from the text of RICO, which compensates only for 'injury to business or property.' Indeed, plaintiffs have not explained how a party's 'expectation' can constitute 'business or property'" (citations omitted)); *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992)(en banc)("a showing of 'injury' requires proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest'" (citation omitted)). *See also Holmes*, 503 U.S.at 279 (O'Connor, J., concurring in part)("We have already remarked that the requirement of injury in one's 'business or property' limits the availability of RICO's civil remedies to those who have suffered injury in fact" (*citing Sedima*, 473

U.S. at 496)). Such "expectation" interests are particularly unavailing where, as here, the City's expectation would not even exist but for the allegedly wrongful conduct of the petitioners. In other words, the non-litigant customers themselves would not have owed taxes had they not purchased cigarettes from petitioner Hemi Group. *Heinold v. Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987)(a plaintiff does not have standing to sue under RICO when "the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation").

The analysis by these lower courts regarding RICO's "injury to property" standing limitation is in accord with this Court's treatment of the issue under antitrust law. In *Hawaii*, this Court specifically held that injury to sovereign interests is not an injury to "property" for purposes of standing under the Clayton Act.[17] In that case, the State of Hawaii sought to recover antitrust damages in three distinct capacities: in its proprietary capacity for overcharges for petroleum products sold to the State itself; as *parens patriae* for similar overcharges paid by the citizens of the State; and as the representative of the class of all purchasers in Hawaii for identical overcharges. The district court granted motions to dismiss the class action claims but denied motions to dismiss the State's *parens patriae* claim. *Hawaii v. Standard Oil Co.*, 301 F. Supp 982 (D. Haw. 1969). On interlocutory appeal,

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[17] *Compare* 405 U.S. at 253 (Hawaii's third amended complaint, "charged [defendants] with violating the Sherman Act") *with* 405 U.S. at 260 ("Hawaii grounds its claim for treble damages in § 4 of the Clayton Act").

the Ninth Circuit Court of Appeals reversed the district court and directed that the *parens patriae* claim be dismissed. 431 F.2d 1282 (9th Cir. 1970). This Court affirmed the Ninth Circuit Court of Appeals' determination of this issue. In doing so, the Court stated that if damage to quasi-sovereign interests of the State "is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act." 405 U.S. at 264.

No matter how valuable the City's sovereign interest in recovering tax payments from non-litigant third parties may be in the City's eyes, it is nothing more than an expectation of possible collection through sovereign authority from taxpayers who are not parties to this litigation. It is at best a sovereign, not "property," injury that does not provide the City RICO standing.

D. A municipality is not a "person" as defined by RICO when the municipality seeks to recover for injury not to "business or property," but instead to a sovereign interest.

This Court consistently has recognized the "longstanding interpretive presumption that 'person' does not include the sovereign." See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) and cases cited therein. Although the presumption is not a hard and fast rule of exclusion, it "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id.* at 781 *citing Int'l Primate Prot. League*

v. Administrators of Tulane Ed. Fund, 500 U.S. 72, 83 (1991).

States have been recognized by this Court to have standing to sue as a "person" under the Clayton Act. E.g., *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Georgia v. Evans*, 316 U.S. 159 (1942). However, because the definition of the word "person" differs substantially between the antitrust and RICO statutes, simple reference to antitrust precedent is unavailing.[18]

RICO defines person as any individual or entity "capable of holding a legal or beneficial interest in property."[19] The antitrust laws make no mention of the ability to hold an interest in property and instead provide that the word "person" shall "include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." Clayton Act, 15 U.S.C. § 12; Sherman Act, 15 U.S.C. § 7. Thus, while Congress adopted much of the civil remedy provisions in RICO from the antitrust statutes, it specifically did

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[18] *Cf., Michigan, Dep't. of Treasury v. Fawaz*, 653 F. Supp. 141, 142-43 (E.D. Mich. 1986)(state treasury department is not a "person" having standing to bring a civil RICO action against a state tax violator, noting that the Supreme Court's broad interpretation of RICO, "do[es] not stretch so far as to encompass a sovereign's attempt to prosecute its own citizens in a federal forum for state sales tax violations") *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988).

[19] "'person' includes any individual or entity capable of holding a legal or beneficial interest in property;" 18 U.S.C. § 1961(3).

not adopt into RICO the definition of "person" in the antitrust statutes.[20]

Instead, when drafting RICO, Congress elected to define "person" as individuals or entities "capable of holding a legal or beneficial interest in property." Because Congress used the word "property" in the ownership context to define "person" in RICO, standing to recover for an injury to "business or property" under RICO must likewise be limited to the commercial ownership context, and not expanded to include injury to sovereign interests. This is so because "[t]he source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir. 1985); *cert. denied*, 479 U.S. 1060 (1987), *citing Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976). In other words, because Congress elected to limit RICO's private civil remedies to a "person" holding a legal or beneficial interest in property, a municipality does not have standing when acting in some other manner, such as its non-proprietary, sovereign capacity.

Because the City owns no "legal or beneficial interest" in its sovereign authority to collect taxes, but

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[20] Not referring to antitrust precedent regarding the definition of "person" is in no way inconsistent with referring to such precedent when interpreting the meaning of the phrase "injured in his business or property." The word "person" is defined in both antitrust statutes in a completely different manner than the definition in RICO. Moreover, the phrase "business or property" in RICO was taken directly from the antitrust laws, whereas the definition of "person" in RICO was not.

instead collects taxes pursuant to its sovereign power, the City does not qualify as a "person" under RICO's definition of the word when suing to recover for injury to its sovereign interests.

III. New York City Does Not Have RICO Standing Because Its Alleged Injury Is Indirect.

A. Only directly injured parties have civil RICO standing.

Standing under RICO is determined by proximate causation, not actual "but for" causation. *Holmes*, 503 U.S. 265-266. Proximate causation exists only where there is a direct relationship between the alleged injurious act and the claimed injury. Indirect claims do not confer standing. *Anza*, 547 U.S. at 460. Just last year, Justice Thomas, speaking for a unanimous Court, confirmed this direct injury requirement, explaining that a finding of proximate causation for RICO claims requires that a "particular emphasis" be placed on the "demand" for a direct relation between the asserted injury and the alleged RICO violation. *Bridge*, 128 S. Ct. at 2142 (*citing Holmes*, 503 U.S. at 268). In *Bridge*, the Court reaffirmed the need to assess at the pleading stage whether the complaint alleges "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." *Id.*, 128 S. Ct. at 2144.[21]

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[21] See also *Holmes*, 503 U.S. at 287 (Scalia, J., concurring in the judgment)("Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith").

This Court's recent decision in *Anza* is particularly instructive. In *Anza*, the defendant failed to charge New York sales tax to its customers and filed fraudulent tax returns with the New York State Department of Taxation and Finance, thereby undercutting its competitor, the plaintiff Ideal Steel. Justice Kennedy, writing for the majority, concluded that Ideal's injuries were not proximately caused by the defendants' actions because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458.

Unlike in *Bridge* (where the plaintiff and other losing bidders were the only injured parties (128 S. Ct. at 2144)), and just as in *Anza* (where nonpayment of taxes resulted in direct injury only to non-litigant third parties), if the City's allegations are true then either the customers themselves or the State of New York are the directly injured parties, with any injury to the City flowing from their misfortune.[22] *Compare Bridge*, ("here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue") *with Holmes*, 503 U.S. at 268 (upholding dismissal of plaintiff's RICO claim as indirect because it "complained of harm flowing merely

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[22] *City of New York*, 541 F.3d at 460 (Winter, J., dissenting)("The City was at best an expectant gratuitous donee of information from the State, and the suggestion that the City's harm is somehow less attenuated than the plaintiff's in *Anza* seems to me unsustainable").

from the misfortunes visited upon a third person by the defendant's acts . . . .").

New York City has suffered no direct injury, proximate or otherwise, and therefore lacks standing to bring a civil RICO claim against petitioners.

B. Injury to government in its sovereign capacity is always indirect.

In many ways the question of whether a municipality has standing to recover alleged damage to its sovereign interests is simply the other side of the proximate injury coin. That is so because sovereign power derives from the citizens of the realm – and injury to that derivative interest must, by definition, be derivative as well. *E.g.*, William Henry Burroughs, *Law of Taxation*, § 6 (Baker, Voorhis & Co., 1877) ("The power of taxation, being an incident of sovereignty, is co-extensive with that of which it is an incident"); *accord Hawaii*, 405 U.S. at 258 ("The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act"); *and see Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 539 (2007)(Roberts, C.J., dissenting)(noting the distinction between "a State's standing to assert a quasi-sovereign interest – as opposed to a direct injury . . . .").

RICO's proximate cause requirement is particularly compelling in connection with claims based on alleged injury to sovereign interests, as such claims are inherently speculative, remote and by their very nature risk multiple recoveries at numerous levels.

Cf., Hawaii, 405 U.S. at 262 n.14 ("Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health -- a task extremely difficult in the real economic world rather than an economist's hypothetical model" (internal quotations and citation omitted)). As noted by the Court in *Anza*, one role of the proximate cause requirement is to minimize "the speculative nature" of the proceedings needed to assess damages. 547 U.S. at 459-460 (the direct injury requirement prevents "intricate, uncertain inquiries from overrunning RICO litigation"). In *Bridge*, Justice Thomas similarly recognized that:

> The direct-relation requirement avoids the difficulties associated with attempting "to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors," prevents courts from having "to adopt complicated rules of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries," and recognizes the fact that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

Bridge, 128 S. Ct. at 2142, *citing and quoting Holmes*, 503 U.S. at 269-270.

Moreover, RICO's exclusion of standing for plaintiffs seeking to recover for injury to sovereign interests falls squarely within the "zone of interest"

analysis articulated by Justice Scalia in his concurring opinion in *Holmes*, 503 U.S. at 286. In that opinion, Justice Scalia notes:

> The phrase "any person injured in his business or property by reason of" the unlawful activities makes clear that the zone of interests does not extend *beyond* those injured in that respect – but does not necessarily mean that it includes *all* those injured in that respect. Just as the phrase does not exclude normal judicial inference of proximate cause, so also it does not exclude normal judicial inference of zone of interests.

503 U.S. at 288 (Scalia, J., concurring in the judgment)(emphasis in original). *See also id.* at 287 n. * ("It may be that proximate causality is *itself* an element of the zone-of-interests test as that phrase has ordinarily been used" (emphasis in original)).

Even if this Court concludes that Congress, in limiting RICO standing to a person injured "in his business or property," did not intend to adopt a blanket prohibition on claimed injury to sovereign interests, those claims are nevertheless barred because injuries suffered by government in its sovereign capacity, by their very nature, are indirect. Therefore, the "sovereign capacity" standing question also is susceptible to resolution through application of RICO's proximate cause standing requirement.

C. New York City's derivative injuries are too indirect to meet RICO standing requirements.

The facts alleged by the City in this case demonstrate on a specific level how injuries to sovereign interests in general are too remote to satisfy RICO's proximate cause standing requirement. In the instant case, as in *Anza*, the City's injuries are not only speculative but also indirect. In the dissent authored by Judge Winter to the Second Circuit Court of Appeal's two-judge majority decision now before this Court, Judge Winter explains why New York City's claimed injuries cannot be proximately caused by the appellants' alleged activity. In doing so Judge Winter notes (referring to this Court's decision in *Anza*):

> If anything, however, the plaintiff in *Anza* had a stronger case with respect to proximate causation than the plaintiff here. In *Anza*, the defendant was the tax evader and had thereby lowered its costs and gained a competitive advantage over the plaintiff. In the present case, the City lost tax revenue because appellees sold cigarettes to purchasers, but did not report these sales to the State, as required by the Jenkins Act; because of this failure to report, the State was unable to pass on reports of such sales to the City even if it had been inclined to do so; without reports from the State, the City was unable to collect sales taxes from purchasers; concurrently, the purchasers individually opted not to fulfill their tax obligations to the City's taxing authorities. The City was at best an expectant gratuitous donee of information from the State, and the

> suggestion that the City's harm is somehow less attenuated than the plaintiff's in *Anza* seems to me unsustainable.

City of New York, 541 F.3d at 460 (Winter, J., dissenting); *cf. Anza*, 547 U.S. at 462, 126 S. Ct. at 1999 (Scalia, J., concurring)("it is inconceivable that the injury alleged [by Ideal Steel] in the 18 U.S.C. § 1962(c) claim at issue here is within the zone of interests protected by the RICO cause of action for fraud perpetrated upon [non-litigant] New York State").[23]

Through better distribution (using the Internet) and better pricing, petitioner the Hemi Group was able to attract customers. That "the purchasers individually opted not to fulfill their tax obligations to the City's taxing authorities" does not make the City's resulting losses a direct injury to its "business or property."[24] Indeed, the City's failure to collect taxes

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[23] In his dissent, Judge Winter also warned of the inappropriate expansion of mail and wire fraud jurisprudence, noting "this case is a further major expansion of mail fraud doctrine by allowing suits against defendants who owed no duty to provide information to the plaintiffs." 541 F.3d at 460. *See also Sedima*, 473 U.S. at 502 (Marshall, J., dissenting)("The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have 'tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution of conduct that some had thought was subject only to state criminal and civil law'" (internal quotations and citations omitted)).

[24] "It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y.C. Admin. Code § 11-1302(a)(3).

"could have resulted from factors other than petitioners' alleged acts of fraud." *Anza*, 547 U.S. at 459. Citizens do not pay taxes "for many reasons, and it would require a complex assessment to establish what portion of" the plaintiff's damages were the product of petitioners' alleged actions. *Id.* Indeed, in a remarkable admission the City concedes that its injury is due to "the individual taxpayers' failure to voluntarily pay use taxes to the City." City of New York's Br. Opp'n to Petition for Writ of Certiorari at 7; *see also* Br. Opp'n to Petition for Writ of Certiorari at 2 ("such use taxes typically go unpaid"). *Vicon Fiber Optics Corp. v. Scrivo*, 201 F. Supp. 2d 216, 219 (S.D.N.Y. 2002)("A predicate act does not proximately cause an injury if it merely furthers, facilitates, permits or conceals an injury that happened or could have happened independently of the act").

Moreover, it is beyond dispute that some unknown and indeterminate portion of the New York City resident customers who purchased cigarettes from the petitioner Hemi Group never owed any taxes to begin with. This is so because the City exempts from its tax the possession or use "of four hundred cigarettes or less brought into the city." N.Y.C. Admin. Code § 11-1302(b)(1); *see also* N.Y.C. Admin. Code § 11-1306. Furthermore, just as in *Holmes*, if allowed to continue its lawsuit, "the district court would first need to determine the extent to which their inability to collect . . . was the result of the alleged conspiracy . . . as opposed to, say, . . . poor business practices . . . ." 503 U.S. at 272-273.

Under the circumstances, allowing the City to pursue RICO claims against a business that offered lower prices and better distribution would result in

exactly the type of harm, yet even one level further removed, as that cautioned against by Justice Breyer in his concurring opinion in *Anza*. There, although the complaint alleged the RICO defendant, "did not 'charge' or 'pay' sales taxes or accurately 'report' sales to the State" and in so doing offered a lower price and "funded the price cut from the savings," Justice Breyer nevertheless noted that "the source of the savings is, in my view, beside the point as long as the price cut itself is legitimate." 547 U.S. 487-488. *See also id.* at 486 ("I would read into the private treble-damages provision a 'proximate-cause' limitation that places outside the provision harms that are traceable to an unlawful act only through a form of legitimate competitive activity"); *cf., Sedima*, 473 U.S. at 520 (Marshall, J., dissenting)(RICO cases against legitimate businesses, "take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels"); *and* at 526 (Powell, J., dissenting)("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute").

Justice Thomas' partial concurrence in *Anza* is apposite. As Justice Thomas notes: "it was petitioners' own conduct – namely, their underpayment of tax – that permitted them to undercut respondent's prices and thereby take away its business." That distinction further demonstrates the indirect nature of New York City's alleged injury in this case because petitioners here owed no taxes. *Miller Bros. Co.*, 347 U.S.at 346 ("It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself").

As recognized by Judge Winter, the majority decision under review by this Court conflicts with the directness requirement set out by the Court in *Anza* and *Holmes*. The City's claim is indirect because it depends on a string of intermediate contingencies, and its theory of harm – with a lengthy causal chain and numerous intervening causes – satisfies no theory of causation that could be deemed proximate.

D. The New York Court of Appeals' has confirmed that New York City's alleged injuries are indirect.

In addition to deciding the federal law issue now before this Court, the Second Circuit Court of Appeals certified two state law questions to the New York Court of Appeals.[25] The day after this Court issued its writ of certiorari to the Second Circuit Court of Appeals, the New York State Court of Appeals heard argument on the two certified state law questions. On June 9, 2009, the New York State Court of Appeals issued its unanimous decision holding that the City of New York: (1) lacks standing to bring a state law consumer claim under New York General Business Law ("G.B.L.) § 349; and (2) cannot assert a common law public nuisance claim predicated on New York Public Health Law § 1399-II. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699 (N.Y. June 9, 2009).

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[25] *City of New York*, 541 F.3d at 458 ("We retain jurisdiction over those [two certified state law] claims pending the New York Court of Appeal's disposition.").

Of particular importance to the proceedings before this Court is the State Court of Appeal's decision regarding the City's claims under GBL § 349. Specifically, in ruling on that issue the New York Court of Appeals held that the City, "has failed to establish standing here because its claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet." *City of New York v. Smokes-Spirits.com*, No. 92, 2009 slip op. 4699 at 4 (N.Y. June 9, 2009).

The City's lack of proximate cause to support its federal RICO action is confirmed by the rejection of its claim on the almost identical issue which it argued unsuccessfully before the New York Court of Appeals: whether the City's claims are derivative of the claims of others. The City's proximate cause argument in both actions is based on exactly the same set of alleged facts. Those facts, as confirmed by the New York State Court of Appeals, show that the City at most has alleged only indirect, derivative injury. *Cf. Kaufman v. Seidman*, 984 F.2d 182 (6th Cir. 1993) (barring RICO claims where the issue of causation was essentially the same as issue of causation decided in state court action); *J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541 (5th Cir. 1987)(barring RICO claim based upon the same facts as usury counterclaim previously litigated in state court proceeding).

This Court should confirm, as did the New York Court of Appeals, that the City's alleged injuries are derivative, not proximately caused by the alleged actions of the petitioners, and therefore not cognizable under RICO.

IV. Conclusion.

The holding of the Second Circuit Court of Appeals that the City of New York has standing to pursue its RICO claims should be reversed.

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RESPONDENT'S BRIEF

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IN THE

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HEMI GROUP, LLC and KAI GACHUPIN,

Petitioners,

v.

CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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COUNTER-QUESTION PRESENTED

Does the City of New York have standing under RICO because lost tax revenue constitutes a direct injury to the City's "business or property" in accord with the statute, 18 U.S.C. § 1964(c), and this Court's authority?

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COUNTER-STATEMENT OF THE CASE

Respondent, the City of New York ("the City"), respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-69a).[1] Petitioners, the Hemi Group and Kai Gachupin (hereafter "Hemi"), engage in mail and wire fraud, 18 U.S.C. §§ 1341, 1343, in violation of section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (hereafter "RICO").[2] Hemi's systematic business scheme defrauds the City by evasion of the City's cigarette excise tax, including by Hemi's failing to report its Internet cigarette sales made to New York residents as required by the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and by affirmative misrepresentations, such as that sales are "tax-free," causing the City to lose millions of dollars of cigarette excise tax revenues. The tax losses that flow directly from Hemi's conduct constitute an injury to the City's business or property within the meaning of 18 U.S.C. § 1964(c).

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1. "Pet. App." refers to Hemi's Appendix filed with the petition for a writ of certiorari.

2. RICO is one of twelve substantive titles of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. No. 91-452, 84 Stat. 922 (1970). Section 1962(c) of the RICO Act provides, in relevant part, that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c) (Pet. App. 178a-79a).

A. Background.

Tax evasion is the economic foundation of Hemi's business. Taking advantage of New York City's legislative decisions to maintain high cigarette prices through imposed cigarette taxes, Hemi, situated in a jurisdiction where negligible taxation yields low cigarette prices, advertises and sells its low-priced cigarettes over the Internet to consumers in "high-tax" jurisdictions, such as New York City.

To offset the loss of taxes caused by interstate taxing discrepancies on cigarettes, in 1949, Congress enacted the Jenkins Act, 15 U.S.C. § 375 *et seq.*, requiring out-of-state cigarette sellers to register and file a monthly report with the tobacco tax administrator of each state where the seller ships cigarettes to consumers. The report identifies the name, address, and quantity of cigarettes purchased by the consumers. 15 U.S.C. § 376. Although the cross-border purchaser must actually pay the taxes, the Jenkins Act assures that taxing authorities have the information necessary to collect such taxes.

The legislative history of the Jenkins Act shows that it

> was enacted for three major reasons: (1) the large and increasing loss of revenue to the States caused by the evasion of sales and excise taxes on cigarettes shipped in interstate commerce to consumers; (2) the discrimination caused by this evasion against sellers of cigarettes in States having a higher

> tax than the tax of the seller States; and (3) the fact that this evasion was accomplished through the use of the United States mail.

See S. Rep. No. 84-1147 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2883, 2883-84 (quoting from Committee on Ways and Means report); *see also* S. Rep. No. 644 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2158, 2159-60.

The Jenkins Act requirements reflect "Congress' recogni[tion] . . . that interstate sales of cigarettes could be a form of tax evasion when the transactions were accomplished by practices that deliberately enabled the purchasers to escape taxes." *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975).[3]

New York State law authorizes the City of New York to impose its own excise tax on cigarettes and authorizes collection and administration by the fiscal officers of the City. *See* N.Y. Unconsol. Law § 9436(1). New York State also imposes a tax on all cigarettes used or sold in the State. *See* N.Y. Tax Law §§ 471, 471-a.

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3. In 1978, Congress enacted the Contraband Cigarette Trafficking Act, 62 Stat. 2465 18 U.S.C. § 2341 *et seq.* (the "CCTA"), which, *inter alia*, makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes" [later defined as a quantity in excess of 10,000 cigarettes, which bear no evidence of payment of applicable State or local cigarette taxes]. 18 U.S.C. § 2342(a). The CCTA's legislative history, like that of the Jenkins Act, shows congressional recognition of the inherent profitability of shipping cigarettes from low tax to high tax states, the massive tax losses caused by such shipments and the ill-effects of those multi-million dollar revenue losses. *See, e.g.*, H.R. 95-1269, 95th Cong., 2nd Sess. 4 (1978) (34 states losing $400 million each year).

As codified in the New York City Administrative Code ("N.Y.C. Admin. Code"), Ch. 13, Title 11, the City imposes a tax on all cigarettes possessed in the City for sale or use. *See* N.Y.C. Admin. Code § 11-1302. Most cigarette taxes are collected by the City and State through their respective sales of tax stamps, which are required on all cigarettes sold in the State. *See* N.Y. Tax Law § 471. Under federal law, sellers located out-of-state may not be required to purchase and apply New York tax stamps, but they are required to file Jenkins Act reports so that the City and the State are able to identify resident purchasers of out-of-state cigarettes from whom to collect excise taxes.

The City collects its cigarette excise taxes directly, or, alternatively, a purchaser can pay the State and City cigarette excise taxes together and the State remits the revenue to the City. *See* N.Y.C. Admin. Code § 11-1302(f); *see also id.* § 11-1310 (description of statutory remedies available to the City's Department of Finance). The payment of cigarette excise taxes is generally credited to and deposited in the general fund of the City. *See* N.Y. Unconsol. Law § 9437 ("Revenues resulting from the imposition of taxes authorized by this act [] shall be paid into the treasury of any such city and shall be credited to and deposited in the general fund of any such city"); N.Y.C. Admin. Code § 11-1318 (same).

B. Litigation History.

In the second amended complaint, dated February 8, 2005, the City alleges that Hemi commits mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343,[4] by its scheme to defraud the City of cigarette excise tax revenues (*City v. Nexicon* 2d Am. Complaint, dated 2/28/05 (reproduced in Circuit Joint App. A1007-39)). Hemi: (1) advertises the cigarettes over the Internet to City residents, (2) ships the orders by common carrier or the United States Postal Service into New York City, (3) refuses to comply with the Jenkins Act's registration or reporting requirements, and (4) affirmatively states on its websites that it is not required to report the sales and that the sales are "tax-free" (*id.* at A1029-35). The City further alleges that Hemi's failure to comply with the Jenkins Act is an essential part of its business model because the savings that customers obtain from buying cigarettes online from a business in a low-tax jurisdiction are entirely attributable to the New York State and City taxes that are not included in the cigarettes' sales price (*id.* at A1008-12).[5]

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4. The mail and wire fraud statutes prohibit the use of the mails or interstate wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . ." 18 U.S.C. §§ 1341, 1343.

5. The enterprises are described in the Circuit's opinion (Pet. App. 12a-15a). The Circuit held that the City's main alleged Hemi enterprise, the Hemi Group, LLC, and Kai Gachupin, as owner or officer, met the standards in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62 (2001) (*see* Pet. App. 14a-15a). However, the Court found that the alternate association-in-fact enterprise failed to plead sufficient facts to support the requisite continuity of structure and personnel and consensual decision-making (*id.*).

The Second Amended Complaint further pleads that New York State and New York City have entered into agreements for the administration and sharing of information with respect to the collection of cigarette taxes (*id.* at A1021-22). The City alleges, consistent with the language of the latest such agreement, that "with respect to the collection of cigarette taxes, New York City will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act reports" (*id.* at A1021).[6]

Hemi affirmatively advertised its tax evasion scheme by assuring potential customers that Hemi "do[es] not

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6. The latest such agreement, dated June 28, 2002, provides (Jt. Tax Agreement, Circuit Jt. App. A1000-04; *see also* Pet. App. 10a n.6):

> It is agreed that Taxation [the New York State Department of Taxation and Finance] and Finance [the New York City Department of Finance] shall cooperate fully with each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes as follows:
>
> (1) Information obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements; . . .
>
> (3) All violations of Article 20 of the Tax Law or Chapter 13 of Title 11 of the [Administrative Code of the City of New York] and all facts or information tending to indicate any such violation.

report any sales" to the State taxing authorities and by falsely assuring them that Hemi is "not required to do so," that there is "no tobacco tax," and by falsely asserting that Hemi's cigarettes are "tax-free" (*id.* at A1032-35; *see* Ex. A to RICO Statement, dated 1/17/03, Circuit Jt. App. A844-67, attaching printouts from enterprise websites owned or controlled by Hemi; *see also* Pet. App. 9a-11a).

For example, the CigaretteSpecials.com's website proclaimed that "All sales are tax free!!" and had a flashing banner stating "No tobacco tax" (Circuit Jt. App. A814, A856, A852). The buydiscountcigarettes.com website had a flashing banner stating "No tobacco tax" and also made false statements that it does not have to file Jenkins Act reports (*id.* at A814, A856, A852).[7]

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7. Hemi Group owns or controls the following retail cigarette outlets: "Cigarettespecials," "BuyDiscount Cigarettes," "FreeCigs4u," "Cyber Cigarettes," "Adobe Cigarettes" and "A1Cigs." The outlets' websites made the following statements (Circuit Jt. App. A1013-14, A1033-34, A844-A856):

> CigaretteSpecials.com does not share your personal information with *any* third party, including State taxing authorities. [www.cigarettespecials.com, "Privacy Policy" (emphasis in original)]
>
> CigaretteSpecials.com does not report any sales activity to any State taxing authority and is not required to do so. [www.cigarettespecials.com, "Legal Notices"]
>
> No tobacco tax (flashing banner)
>
> **All sales are tax free!!** (boldface emphasis in original) [www.cigarettespecials.com, "Home Page"]

(Cont'd)

Hemi so advertised because collection of the cigarette excise tax from Hemi's customers would wipe out virtually all of the customers' "savings," made by purchasing from Hemi, and, so, any incentive for customers to continue patronizing Hemi's businesses. Notably, Hemi's brief fails to acknowledge its Jenkins Act obligations and its acknowledged, indeed, flagrant and willful, failure to comply with the Act and its misrepresentations on its websites (Pet. Br., *passim*).

The City thus alleged that Hemi's acts of mail and wire fraud — including the failure to file Jenkins Act reports and the fraudulent misrepresentations on its websites in furtherance of the scheme to defraud the City of excise tax payments — injured the City in its "business and property." By failing to file the required reports, Hemi conceals from the City taxable sales to City residents, making it impossible for the City to collect its cigarette excise taxes and resulting in lost tax revenue. The City alleges that it has lost "tens[,] if not hundreds[,] of millions of dollars a year in cigarette excise tax revenue" (3rd Am. RICO Statement, 2/8/2003, Circuit Jt. App. A996).[8]

(Cont'd)

> No tobacco tax [flashing banner] [www.buydiscount cigarettes.com, "Home Page"]
>
> FreeCigs4u.com does not report any sales activity to any State taxing authority and is not required to do so. [www.FreeCigs4u.com, "Legal Notices"].

8. The City also alleged that, in instances when the City had received information that identified Internet cigarette purchasers, the City sought and received substantial payments of the taxes owed and that there was some correspondence from

(Cont'd)

As relief, the City seeks to: (1) recover three times the amount of the tax revenue lost as a result of Hemi's scheme; (2) require prospective compliance with the Jenkins Act; (3) require Hemi to inform customers that taxes are owed on purchases from Hemi's websites and that Hemi will file Jenkins Act reports; (4) enjoin claims that the cigarettes sold to City residents are "tax-free"; and (5) recover attorneys' fees (*City v. Nexicon* 2d Am. Complaint, Circuit Jt. App. A1012, ¶17; *see* Pet. App. 11a-12a). The Hemi action was later consolidated with three others by the Second Circuit.

C. The District Court's Orders.

In its 2005 opinion, upon motions to dismiss by Hemi and other defendants, the U.S. District Court for the Southern District of New York (Batts, D.J.) rejected most of defendants' challenges (Pet. App. 93a-170a), including as to alleged lack of an injury to "business or property" and alleged lack of proximate causation (*id.* 144a-148a). The District Court nonetheless dismissed pursuant to Fed. R. Civ. P. 12(b)(6), finding that the City failed to sufficiently plead individual "persons" distinct

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(Cont'd)

consumers indicating that they were misled by the websites (Circuit Jt. App. A1022 ¶¶ 59-60; *see also* A118-25, A645). In addition, although the District Court had stayed discovery, the City had cited as an example its March 25, 2005 RICO Statement in the companion *Esmokes* case, where, after obtaining information from two settling defendants, the City had forwarded letters to 3100 purchasers, demanding payment of approximately $1.2 million in taxes owed, and had received payment of $651,438.83 from 2091 such purchasers, as of March 25, 2005 (Circuit Jt. App. A594).

from the respective "enterprises," but afforded the City the opportunity to file an amended complaint on the federal claims only (*id.* 93a-170a).

Following the Second Amended Complaint, the various defendants again moved to dismiss for lack of subject matter jurisdiction and personal jurisdiction, and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) (*see* Circuit Jt. App. A219-33, A425-27, A675-77, A1040-72).

In its 2006 opinion, the District Court dismissed the Second Amended Complaint for failure to state a claim. It found that the two alternative forms of RICO enterprises were insufficiently pled, including because the alleged RICO persons (employees and/or officers of the businesses) did not have individual duties to file Jenkins Act reports (Pet. App. 70a-92a).

D. The Order of the Circuit Court of Appeals.

By opinion and order dated September 2, 2008, authored by Judge Straub, joined by former Circuit Judge Sotomayor, the Second Circuit vacated in large part the District Court's judgment and reinstated the majority of the federal RICO claims, severing the state claims and remanding the RICO claims for immediate further proceedings (Pet. App. 1a-69a).

Discussing whether the City suffered an injury to its "business or property" as required by 18 U.S.C. § 1964(c), the Circuit held (Pet. App. 33a-34a):

> Defendants argue that the City's allegations of lost taxes do not allege an injury to the City's "business or property" because that injury was not one the City incurred as a party to a commercial transaction. This argument finds support in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990), where we suggested that a municipality must have sustained its injury as a party to a commercial transaction to have standing under RICO. However, we have since explained that our statements to that effect in *Town of West Hartford* were merely *dicta*. *See Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000, 123 S. Ct. 513, 154 L. Ed. 2d 394 (2002).
>
> We see no reason to import an additional standing requirement on municipalities for RICO claims, and thus expressly reject our *dicta* to the contrary in *Town of West Hartford*. *See Sedima* [*S.P.R.L. v. Imrex Co.*], 473 U.S. [479], 495, 497-500 [1985] (noting that "RICO is to be read broadly," and overruling [the Second Circuit's] engrafting of a "racketeering injury" requirement which found no support in the statute or legislative history). We have consistently held that tax losses from unpaid taxes are "property" for

> purposes of the mail and wire fraud statutes. *See, e.g., Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); . . . . Moreover, in *Anza*, the Supreme Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. Thus, we hold that lost taxes can constitute injury to "business or property" for purposes of RICO, and conclude that the City has adequately met this requirement notwithstanding that its injury did not arise from its participation in a commercial transaction. *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314-16 (7th Cir. 1985) (rejecting the notion that a State government unit suing under RICO is limited to competitive or commercial injuries); *but see Canyon County v. Syngenta Seeds*, Inc., 519 F.3d 969, 977-80 (9th Cir. 2008) (endorsing the *dicta* in *Town of West Hartford*).

The Circuit also held that the City had standing under RICO because it had suffered a direct injury, stating (Pet. App. 26a):

> The principles outlined in [Supreme Court] decisions, as applied to the City's allegations, support a finding that the City has standing. Comporting with *Sedima*, the City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations (the predicate acts of mail and wire fraud in

> furtherance of a scheme to defraud the City of taxes). *See Sedima*, 473 U.S. at 496. Any recoverable damages occurring by reason of a violation of § 1962(c) (a specific dollar amount for each pack of cigarettes sold without complying with the Jenkins Act) flow from the scheme to defraud the City of use taxes at the heart of the alleged predicate acts of mail and wire fraud. *See id.* at 497.

The Circuit found that the City's claims were easily distinguishable from the ones found insufficient in *Holmes* [*v. Securities Investor Protection Corp.*], 503 U.S. 258, 271 (1992), because (Pet. App. 26a-27a):

> unlike in *Holmes* where the plaintiff's injury was derivative, the City's alleged injury of lost tax revenue is directly caused by defendants' alleged schemes. That New York State may also have been injured by defendants' alleged schemes does not make the City's injury any less direct; the City is owed a certain amount of taxes independent of any amount owed to or collected by the State.

The Circuit's opinion then details all the further reasons for its proximate causation finding (Pet. App. 27a-33a; *see post*, Pt. II).

In an opinion dissenting in part and concurring in part, Judge Winter opined that the alleged RICO violation was not the proximate cause of the City's injuries, and therefore the City had no standing to bring the RICO action (Pet. App. 62a-69a). In his view, the

"City was at best an expectant gratuitous donee of information from the State, and the suggestion that the City's harm is somehow less attenuated than the plaintiff's in *Anza* seems to me unsustainable" (Pet. App. 67a).[9]

The Second Circuit denied Hemi's petition for rehearing and rehearing *en banc* on October 30, 2008 (Pet. App. 171a-72a). This Court granted certiorari on May 4, 2009. *Hemi Group, LLC v. City of New York*, 129 S. Ct. 2159 (2009).

SUMMARY OF ARGUMENT

In bringing this action, the City fulfils Congress' vision that directly-injured parties protect their business or property interests by acting as civil enforcers of the RICO statute, complementing RICO's criminal enforcement provisions. *See, e.g., Rotella v. Wood*, 528 U.S. 549, 557 (2000) (quotation omitted).

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9. The Circuit unanimously affirmed the dismissal of the state common law fraud claim, but certified two state law questions as to the City's standing to sue under the State's consumer protection statute, N.Y. Gen. Bus. Law § 349, and to bring a public nuisance claim predicated on N.Y. Public Health Law § 1399-II (Pet. App. 55a-62a). The New York Court of Appeals answered those questions in the negative on June 9, 2009, although it recognized that the City could potentially replead its public nuisance claim based upon alleged unauthorized shipments to minors. 12 N.Y.3d 616 (N.Y. 2009). Subsequently, on August 10, 2009, the Second Circuit affirmed the dismissal of the Gen. Bus. Law claim, but remanded the public nuisance claim to the District Court with directions to consider whether leave to amend should be granted (8/10/09 Order). By further order entered August 26, 2009, the Circuit recalled the mandate and retained jurisdiction pending this Court's decision (8/26/09 Order).

The Second Circuit employed a principled analysis of the RICO statute and this Court's precedent in holding that the City has standing to bring this action under 18 U.S.C. § 1964(c). Based upon RICO's express language, as well as its history and underlying policy, the Court correctly held that the City's lost cigarette excise tax revenues constitute an injury to its property. That injury was the direct consequence of Hemi's systematic mail and wire fraud schemes to defraud the City of cigarette excise tax revenue, through its violations of the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and through its misrepresentations and advertisements that Internet cigarette sales were tax-free and that there was no obligation to report purchase information to the state taxing authorities. The City's injury from Hemi's conduct is no different than the loss of tax revenue caused by other schemes to conceal taxable transactions, where losses of taxes are "property" for purposes of the mail and wire fraud statutes. *Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (wire fraud arising from failure to declare liquor imports into Canada). *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (recognizing that State of New York, as the party directly-injured by the non-collection of sales tax, could properly bring RICO action based upon mail fraud).

The Circuit's opinion accords with: 1) the plain language of the RICO statute, *see, e.g., Russello v. United States*, 464 U.S. 15, 20 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981); 2) Congress' express liberal construction mandate and this Court's ample precedent indicating RICO's broad reach, *see, e.g., Boyle v. United States*, 129 S. Ct. 2237 (2009), citing § 904(a),

84 Stat. 947; and 3) RICO's underlying policy to eradicate enterprise crime in all forms, a purpose distinct and apart from the marketplace concerns present in antitrust law. As a result, this Court's construction of the parallel Clayton Act provision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), is not controlling, and indeed, when properly understood, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), supports the finding that the City has suffered an injury to its property under RICO.

Ample federal law recognizes that tax revenue, and the ability to collect such revenue, is the City's property. *See, e.g., Pasquantino*, 544 U.S. at 355 (using the common law definition of property for purposes of the mail and wire fraud statutes, the predicate offenses upon which these RICO actions are based). Indeed, Congress has virtually directed that lost tax revenue be treated as an injury to property under RICO in enacting the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.*, which almost exclusively targets lost tax revenues resulting from cigarette trafficking, and upon enactment, including that newly-minted crime within RICO's predicate offenses. *See* 18 U.S.C. § 1961(1).

Both New York common law, *see, e.g., Village of Kenmore v. County of Erie*, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930), and statute, *see* N.Y. Gen. Constr. Law §§ 38, 39, also support the City's position.

The City's injury is direct because it is the immediate victim of the alleged RICO violation (the mail and wire fraud based upon the scheme to evade taxes) and its injury is not derivative of an injury to any other entity. The City seeks to recover for only its own injury, which is measured by the lost cigarette excise tax revenue that results from the fraudulent scheme. Under *Anza*, *supra*, the City has standing to bring such a RICO claim. Moreover, the underlying policies of RICO are served by holding Hemi liable for its fraudulent conduct.

As the only entity that imposes the City's cigarette excise tax, there can be no duplicative recoveries of damages and the measure of the damages is easily quantifiable and ascertainable. *Anza*, 547 U.S. at 458-59; *cf. Hawaii*, 405 U.S. at 264. The City's excise cigarette taxes are owed directly to it. *See*, *e.g.*, N.Y. Unconsol. Law § 9437. As a directly injured victim that loses millions of dollars in City cigarette excise tax revenues, which are integral to its fiscal well-being, the City has standing to bring this RICO action.

POINT I

THE CITY HAS STANDING TO BRING THIS RICO ACTION BASED ON DIRECT INJURY TO ITS "BUSINESS OR PROPERTY" CAUSED BY HEMI'S MAIL AND WIRE FRAUD PERPETRATED IN FRAUDULENT BUSINESS SCHEMES DESIGNED TO DEFRAUD THE CITY OF TAX REVENUE AND RESULTING IN SUCH LOST TAX REVENUE.

A. The City Has Suffered An Injury to Its "Business or Property" under 18 U.S.C. § 1964(c). Pursuant to Both Federal and State Statutory and Common Law, The City's Tax Revenues Constitute Its Property.

(1)

With its purposefully broad definition of "racketeering activity," RICO acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises." *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989). The statute is "broad[] enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 248-49. RICO thus does not apply only to "organized crime" in the classic "mobster" sense. *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479, 495 (1985). *See also Turkette*, 452 U.S. at 590, 591. RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its

economic roots." *Russello*, 464 U.S. at 26, 28 (citing with approval G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982)). *See* Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

As Congress directed, the RICO statute therefore contains an express mandate that its terms are to be "liberally construed to effectuate its remedial purposes." *Boyle*, 129 S. Ct. at 2243, citing § 904(a), 84 Stat. 947, note following 18 U. S. C. § 1961; *see also*, *Sedima*, 473 U. S. at 498 ("RICO is to be read broadly. . . . This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition"); *Russello*, 464 U.S. at 21 (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth"). The statute's wide reach is "inherent in the statute as written, and [any] correction must lie with Congress." *Sedima*, 473 U.S. at 499.

Accordingly, this Court has generally refused to adopt narrowing constructions at odds with RICO's express broad language. *See Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it."), and cases cited therein. Congress has never amended RICO to cut back or constrain the breadth of the statute following any decision by this Court.[10]

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10. Tellingly, however, Congress did amend RICO in 1995 to eliminate securities fraud as a predicate act of racketeering

(Cont'd)

(2)

In the instant case, the question posed in the petition for certiorari was: "Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non commercial injury resulting from non payment of taxes by non litigant third parties" (Pet. for Cert., i).

This Court turns first to the language of the statute and its plain meaning. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2128 (2008); *Russello*, 464 U.S at 21; *Turkette*, 452 U.S. at 580. The Court's duty is to interpret a statute "so as to effect its purpose." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 793 (1952).

Section 1964(c) of the RICO Act provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C. § 1964(c). Thus, to have standing under section

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(Cont'd)

for a civil RICO action. *See* S. Rpt. No. 104-98, 104th Cong., 1st Sess., *reprinted in* 1995 U.S.C.C.A.N. 679, 698 (discussing the Private Securities Litigation Reform Act of 1995 and the amendment to 18 U.S.C. § 1964(c), supported by the Securities & Exchange Commission because the securities laws generally provide adequate remedies for those injured).

1964(c), a civil RICO plaintiff must show: (1) that his harm qualifies as injury to his business or property; and (2) that his or her harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992).

Giving the statutory terms their ordinary natural meaning, *see, e.g., Pasquantino*, 544 U.S. at 355, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the City's right to its lost cigarette excise tax revenues is "property" and a valuable legal entitlement under the RICO statute, just as in *Pasquantino*, where the defendants failed to report liquor imports subject to tax. In considering the definition of property for purposes of the wire fraud statute, this Court looked to the common law definition of property, as it has consistently done in construing other terms in the RICO statute. *Pasquantino*, 544 U.S. at 356, citing *Black's Law Dictionary* 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest"). *See also Webster's Third New International Dictionary*, p. 1818 ("property"—definitions 2(a), (b)). This Court held that "the right to tax revenue is property in Canada's hands." *Pasquantino*, 544 U.S. at 356.[11]

In *Pasquantino*, this Court explained why lost tax revenue qualifies as "property" by contrasting such

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11. Although this Court did not express a view on the related question of whether a foreign government, based on wire or mail fraud offenses, may bring a civil action under RICO for a scheme to defraud it of taxes, *Pasquantino*, 544 U.S. at 356 n.2, the ability of a foreign government to bring a RICO action is not at issue here.

losses with losses addressed in its decision in *Cleveland v. United States*, 531 U.S. 12 (2000). In *Cleveland*, this Court held that a State's interest in an unissued video poker license was not "property" because the interest was "'purely regulatory'" and "[could not] be economic." *Id.* at 22-23. But in *Pasquantino*, 544 U.S. at 357:

> Unlike a State's interest in allocating a video poker license to particular applicants, Canada's entitlement to tax revenue is a straightforward "economic" interest. There was no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license; quite the opposite, there was "no dispute that [the defendant's partnership] paid the State of Louisiana its proper share of revenue" due . . . . [citation omitted]. Here, by contrast, the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law. Canada could hardly have a more "economic" interest than in the receipt of tax revenue. *Cleveland* is therefore consistent with our conclusion that Canada's entitlement is "property" as that word is used in the wire fraud statute.

Here, too, the City has alleged that Hemi's scheme aims at depriving the City of money to which it is entitled by law. The City "could hardly have a more 'economic' interest than in the receipt of tax revenue." *Id.* at 357. Indeed, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court expressly recognized that a State

would have a recoverable injury where the allegations were that the defendants defrauded the State out of tax revenues. *Id.* at 460. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (money "of course, is a form of property.").

Furthermore, in *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950), this Court, in considering the extent to which a taxpayer was obliged to pay interest on an assessed tax deficiency, determined that, "from the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax." *Id.* at 555-56 (citations omitted). Thus, "in the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." *Id.* at 555-56 (citations omitted).

In addition, in enacting the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* ("CCTA"), Congress made a violation of that statute a RICO predicate. 18 U.S.C. § 1961(1). RICO thus provides a civil cause of action against trafficking in cigarettes "which bear no evidence of the payment of applicable State or local cigarette taxes." *See* 18 U.S.C. § 2342(a) (*see ante*, p. 3 n.3). Virtually the only injury that could result from that offense would be a loss of tax revenue. By making the offense a RICO predicate, Congress has indicated that tax losses should be treated as "injury to business or property."

It is also well-recognized that "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also Butner v. United States*, 440 U.S. 48, 55 (1979).

Under New York State statutory and common law, tax revenues are property because money is property by definition. *See* N.Y. Gen. Constr. Law §§ 38, 39 (the term property includes personal property and personal property includes money).[12] "A city or village holds the proceeds of taxation as its corporate property. It may use the moneys received as it pleases for purposes of local government or for any other purpose within its corporate powers." *Village of Kenmore v. County of Erie*, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930); *see also Little Falls v. State*, 266 App. Div. 87, 41 N.Y.S.2d 882 (App. Div. 1943), *aff'd*, 291 N.Y. 755, 52 N.E.2d 963 (N.Y. 1943).

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12. In full, N.Y. Gen Constr. Law § 38 provides: "The term property includes real and personal property" and N.Y. Gen. Const. Law § 39 provides: "The term personal property includes chattels, *money*, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." (emphasis added).

Notably, Hemi does not cite *Pasquantino*, nor other relevant federal or state common and statutory law (Pet. Br., *passim*). Hemi offers no reasoned basis why lost tax revenue and the legal entitlement to collect such revenue does not constitute "property" for purposes of a RICO action alleging mail and wire fraud violations.

Hemi's repeated argument that the authority to tax is a sovereign power or interest (Pet. Br., p. 7 & *passim*) confuses sovereign and proprietary interests. While the power to tax may be a sovereign one, the tax revenue itself and the right to collect such tax revenue is a proprietary interest of the government. *See Pasquantino*, 544 U.S. at 357 and cases cited *ante*, pp. 21-24; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992) (in original jurisdiction case between states, this Court distinguished between *parens patriae* sovereign actions and those which involve proprietary direct injuries such as the loss of specific tax revenues).[13]

Such cases as *Case of the State Freight Tax*, 82 U.S. 232, 15 Wall 232, 21 L. Ed. 146, 4 Brewster's Reports 202 (1873) (Pet. Br., pp. 8, 22), which primarily dealt with

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13. *See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982) (this Court reviewed the differences among State governmental interests, including two "easily identified" sovereign interests, the exercise of sovereign power over individuals and entities within the relevant jurisdiction (involving power to create and enforce a legal code, both civil and criminal) and the demand for recognition from other sovereigns (most frequently involving the maintenance and recognition of borders); non-sovereign interests, which include proprietary interests and interests pursued on behalf of a private party; and quasi-sovereign interests).

the interplay of state taxing powers with the Commerce Clause, are not relevant to the issue at hand — whether a State or City defrauded of tax revenue and the ability to collect such revenue suffers an "injury to business or property" within the meaning of the RICO statute.

Finally, Hemi not only ignores the express language of the statute, but also RICO's fundamental mandate requiring that the statute be liberally construed to achieve its purposes (Pet. Br., *passim*). As this Court has held, if that "mandate is to be applied anywhere, it is in section 1964, where RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n.10. The Second Circuit's ruling that the City has suffered a direct "injury to [its] business or property" under 18 U.S.C. § 1964(c) in the form of lost tax revenues caused by Hemi's scheme to defraud is a correct application of the statute, which accords with its language, legislative history, and this Court's precedent.

B. Hemi's Reliance on Inapplicable Antitrust Principles is at Odds With the Congressional Policy Underlying RICO and Its Legislative History.

Hemi unsuccessfully attempts to avoid RICO's text through a convoluted description of its legislative history and a strained statutory construction argument. It uses a flawed analysis to argue that this Court's construction of the phrase "injury to business or property" for purposes of the Clayton Antitrust Act in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), should be found controlling for RICO (Pet. Br., pp. 9-18).

Although "Congress modeled § 1964(c) [in the RICO statute] on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," *Anza*, 547 U.S. at 457, notwithstanding, there are major differences between the two statutes. The antitrust laws are concerned exclusively with marketplace misconduct, while RICO is much broader, reaching, *inter alia*, wire fraud, mail fraud, embezzlement, counterfeiting, robbery, and extortion. 18 U.S.C. § 1961(1).

Thus, the relevant legislative history suggests that, unlike the market competition concerns of the antitrust laws, *see, e.g., Reiter*, 442 U.S. at 342, Congress gave RICO an expansive reach to penetrate all levels of crime with its multifold adverse effects on society. *See Holmes*, 503 U.S. at 270 (noting Congress' rejection "of the concept of antitrust injury to RICO") and cases cited above, *ante*, pp. 18-19. *See also H.J., Inc.*, 492 U.S. at 246 ("Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."); *Sedima*, 473 U.S. at 499. *See generally* 115 Cong. Rec. 6994, 6995 (March 20, 1969) (Report of Antitrust Section of the American Bar Association on S. 2048 and S. 2049) (indicating that not all the accoutrements of the antitrust laws should be imported into RICO and noting concerns with respect to creating "inappropriate and unnecessary obstacles" to those injured by organized crime who might seek treble damage recovery); S. Rep. No. 91-617, p. 76 (1969).

Ignoring the above legislative history, Hemi claims that Congress did not contemplate that an injury to the City's "sovereign tax collection interests" would

constitute an injury to its property (Pet. Br., Pt. II). Hemi thus proposes a limitation not present in RICO itself. *Compare Bridge*, 128 S. Ct. at 2138 ("If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.").

Hemi also suggests that just one month before passage of the mammoth OCCA, of which RICO was but one title and which was years in the making, Congress became aware of the Ninth Circuit's decision in *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972), and accepted the Ninth Circuit's construction of the antitrust term as limited to commercial interests for purposes of RICO (Pet. Br., pp. 11-12). Hemi's pure speculation does not consider Congress' express liberal construction or the different purposes served by RICO.

Then, Hemi attempts to rely on the construction of the phrase "injury to business or property" for purposes of the Clayton Act, citing this Court's decision rejecting the State of Hawaii's *parens patriae* action in *Hawaii*, *supra*, but without considered analysis of the case and its subsequent clarification in *Reiter*, 442 U.S. at 339. When analyzed in light of the RICO statutory scheme, and the *Pasquantino* and *Anza* decisions, there is no question that the City has suffered an injury to its property under RICO.

In *Hawaii*, the state brought a case in its capacity as a *parens patriae* on behalf of its citizens to recover

for damages to its "general economy," claiming violations of the antitrust laws, including section 4 of the Clayton Act, 15 U.S.C. § 15.[14] Hawaii claimed *parens patriae* injuries to the state's "general economy," including extracting its citizens' revenues, increased taxes to offset this loss, curtailment of manufacturing, shipping, and commercial opportunities, injury to the competitive position of Hawaiian goods vis-à-vis other states, and the general frustration of the state's efforts to promote the welfare of its citizens. *Id.*, 405 U.S. at 254.

This Court rejected Hawaii's action, holding that injury to a state's total economy, for which the state sought redress in its *parens patriae* capacity, was not cognizable under section 4 of the Clayton Act. This Court noted that the words "business or property" referred to "commercial interests or enterprises," and reasoned that Hawaii could not recover on its claim for damage done to its "general economy" because such injury did not harm Hawaii's "commercial interests." *Id.*, 405 U.S. at 264. In its decision, this Court largely expressed concern about the specter of duplicative recoveries. *Id.* at 262, 264.

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14. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

However, in *Reiter*, this Court subsequently clarified its *Hawaii* decision, emphasizing that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Id.* at 341. Recognizing the narrowness of the definition of property employed in *Hawaii*, in *Reiter*, this Court expressly held: "... the word 'property' has a naturally broad and inclusive meaning ... comprehend[ing] anything of material value owned or possessed" and that money itself qualifies as a form of "property." *Id.* at 338.

Reiter thus recognizes not only that money such as tax revenue is property, but also this Court's obligation to give effect, if possible, to every word Congress uses and every provision of the statute. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066, 1068 (2009) (quoting *Reiter*, 442 U.S. at 339, with approval).

Additionally, the concerns expressed in *Hawaii* are not present here, in that: 1) as to the City's tax, the City is the only target of the harm and there will be no proliferation of actions, such as with potential business competitors, because the only victim of the harm is seeking redress; and 2) the measure of damages is easily ascertainable and quantifiable. *See Anza*, 547 U.S. at 458-59, and discussion *post*, Pt. II.

Hemi's proposed commercial injury requirement conflicts with this Court's precedent and the purposes of RICO. Although RICO borrowed tools of antitrust law to combat criminal activity by enterprises, Congress "nowhere suggested that actual anti-competitive effect is required for suits under [RICO]," as evidenced by the language it chose, allowing recovery to "any person

injured in his business or property," which is "not so limited." *Sedima*, 473 U.S. at 497 n.15 (in borrowing racketeering injury requirement from antitrust standing principles, "the court below created exactly the problems Congress sought to avoid"); *Holmes*, 503 U.S. at 270 (noting the rejection of the concept of antitrust injury to RICO); *Cedric Kushner*, 533 U.S. at 166 (noting that the intracorporate conspiracy doctrine does not apply under RICO because it "turns on specific antitrust objectives"). Even in the Clayton Act context, this Court has refused to require a "commercial injury" in construing "business or property" as "strained." *Reiter*, 442 U.S. at 338-39.

Here, construction of the RICO statute to include tax revenue as property serves the purpose of helping curb enterprise criminal activity and the resulting economic injuries. For, just as RICO's legislative history forewarned, Hemi's racketeering scheme has helped to "drain[] millions from the American economy," *see* 84 Stat. at 922. Indeed, the City is fulfilling the RICO Act's central purpose "not merely . . . [to] compensate victims but to turn them into prosecutors, 'private attorneys general,'" *Rotella*, 528 U.S. at 557 (quotation omitted) and "to divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585. *See generally* Paul A. Hoffman, Comment, *Standing And Liability Of State And Local Government Under The Civil RICO Statute*, BYU L. Rev., 1 Winter 174, 202-203 (1989) ("The use of federal civil RICO is a valuable tool for state and local governments to recover their losses from illegal business or taxpayer practices, to effectively and less expensively deter illegal activities and to overcome the prosecutorial inadequacies of state and federal criminal laws."). As

Internet businesses proliferate and are able to start up with very little cost, it is critical that they not advocate or employ business models that promote cigarette tax evasion.[15]

Hemi does not mention its mail and wire fraud, including Jenkins Act violations and active misrepresentations and advertisements. Yet, Hemi has engaged in precisely the conduct that Congress has consistently tried to end – a deliberate and systematic business plan to conceal and perpetuate cigarette tax evasion. In this regard, Judge Winter's dissent, which attempts to narrowly parse out the acts of fraudulent conduct in this fraudulent business scheme (Pet. App. 64a-66a), is unavailing. Among other things, it fails to liberally construe the complaint, as required by RICO (*see* 2d Am. Complaint, Circuit Jt. App. A1029-35, which describes a pattern of ongoing unlawful activity through a scheme to defraud the City of tax revenues, by repeatedly using the mails and wires to ship, sell and

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15. *See* GAO-04-641, a Report to the Chairman and Ranking Minority Member, Committee on Government Reform, House of Representatives, entitled "*CIGARETTE SMUGGLING Federal Law Enforcement Efforts and Seizures Increasing*" (May 2004), *available at www.gao.gov/cgi-bin/getrpt?GAO-04-641*, which states that "As cigarette taxes increase so do the incentives for criminal organizations to smuggle cigarettes into the United States. Cigarette smuggling results in lost tax revenues, undermines government health policy objectives, can attract sophisticated and organized criminal groups, and could be a source of funding for terrorists." *Id.*, Highlights page. *See also id.*, pp. 6-7 (citing July 22, 2003 Report of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Illicit Cigarette Trafficking and the Funding of Terrorism*).

distribute cigarettes to City residents while concealing the sales from tax authorities and website statements that sales are tax-free and not required to be reported to any taxing authority).

Given that it cannot rely on the language of RICO or its relevant legislative history and public policy, Hemi is reduced to reliance on inapposite case law, arguing that the injury must relate to a commercial transaction. The cases cited by Hemi are largely distinguishable on the critical ground that they involve alleged injury to government public services or more amorphous, less directly quantifiable claimed losses in the form of additional government expenditures or lost employee salaries.

For example, in the primary case relied upon, *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008), the Ninth Circuit ruled that a governmental entity's expenditure of money to enforce laws or promote the public well-being does not constitute a "property" interest within the ambit of 18 U.S.C. § 1964(c), particularly where the provision of additional public services is based on legislative mandates and intended to protect the public interest. *Canyon County*, 519 F.3d at 976.[16] The Court then rejected a county's claim

16. Significantly, *Canyon County* recognizes the import of *Reiter* in clarifying the *Hawaii* decision, 519 F.3d at 978, but then looks to admitted *dicta* in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), for a commercial injury requirement, which has been repeatedly disavowed by the Second Circuit (*see* Pet. App. 33a-34a, citing *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002)).

against companies which allegedly hired illegal aliens and thereby increased the county's expenditures for law enforcement and publicly-funded health care, holding that a government "does not possess a property interest in the law enforcement or health care services that it provides to the public." *Id.* at 977. *See also Town of West Hartford*, 915 F.2d at 98 (claimed injuries were interference with normal police duties, as well as the cost of increased manpower and equipment needed to respond to the illegal activities).[17]

Finally, Hemi also points to *Michigan, Dep't of Treasury, Revenue Div. v. Fawaz*, 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd*, 848 F.2d 194, 1988 U.S. App. LEXIS 6206 (6th Cir. 1988) (unpublished).[18] In that case, following the defendant's gasoline station operator underreporting his gross income by $6 million, with resulting $240,000 sales tax underpayment, he was criminally prosecuted and convicted in state court and he subsequently complied with court-ordered payment of restitution, plus interest. The Sixth Circuit held that

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17. The District Court cases, *Twp. of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452 (D.N.J. 2008) and *West Virginia v. Moore*, 895 F. Supp. 864 (S.D. W.Va. 1995) (Pet. Br., p. 24), are also inapposite because the claimed injuries, stemming from a right to employees' honest services, were not found to be "concrete financial loss[es]." *See* 545 F. Supp. 2d at 458-59. The present injuries are obviously "concrete financial losses."

18. At the time it was issued in 1988, the Sixth Circuit's practice was to discourage citation of unpublished opinions which were not recommended for publication, but in 2007, following the enactment of Fed. R. App. P. 32.1(b), the Sixth Circuit rule was amended to permit citation of such opinions. Sixth Circuit Rule 28(g).

the State was a person with RICO standing, but then found that applying the RICO statute to an individual sales tax cheater would not fit the purposes and intent behind the RICO to address the threat posed to the country's economy by organized crime. The Court also emphasized that the State had already proceeded against the defendant taxpayer in the state criminal proceeding, which was unlike the situation in *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985). *Fawaz*, 1988 U.S. App. LEXIS 6206 at **3-6. *Anza* recognized, however, that a State may pursue appropriate remedies, including a possible RICO action for lost tax revenue due to mail fraud. *Anza*, 547 U.S. at 458, 460.

In *Illinois Dep't of Revenue*, the Seventh Circuit held that state governmental units can sue under RICO's civil damages provision noting that RICO makes no distinction between state governments, consumers, competitors or other victims in determining who qualifies as a person under the Act. *Id.*, 771 F.2d at 314, 316. The Court also held that the government's loss of money (tax revenue) constituted an injury to property under section 1964. *Id.* While the Court hoped that its decision would appear to Congress as a signal to act to limit RICO, *id.* at 317, Congress declined to do so.[19]

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19. *See generally* T. Todd Tumbleson, Comment, *Tax Fraud and Civil RICO: Implications for Business and Governmental Entities*, 21 U.C. Davis L. Rev. 1233 (Summer, 1988) (comparing the *Phillips* and *Fawaz* decisions and noting that the Seventh Circuit's expressed fear of inundation of civil RICO tax fraud actions had not come to pass).

In contrast to the cases relied upon by Hemi, the instant allegations relate to an enterprise business scheme that expressly defrauds the State and City from tax revenue on a mass basis. Whether government services or salaries constitute "business or property" has no relevance to this case, in which the injury alleged is cognizable as identifiable, quantifiable dollar losses. A construction of the RICO statute which leaves States and localities powerless to recover for such injury when caused by systematic mail and wire fraud schemes would be antithetical to Congress' intention in enacting RICO.

C. Contrary to Hemi's Belated New Argument, the City is a Person Under RICO.

Finally, Hemi raises a new argument that the City is not a person as defined in RICO under 18 U.S.C. § 1961(3) (Pet. Br., Pt. II(C)(3)). That was not a part of the question in the petition for certiorari nor raised below. Accordingly, as a new question, it should not be considered. *See, e.g.*, Supreme Court Rule 14.1(a) (only allowing a "subsidiary question fairly included therein"); *Pasquantino*, 544 U.S. at 372 n.14 (citing *Lopez v. Davis*, 531 U.S. 230, 244 (2001) and declining to address "matter . . . not raised or decided below, or presented in the petition for certiorari").

In any event, 18 U.S.C. § 1961(3) provides that a "person" "includes any individual or entity capable of holding a legal or beneficial interest in property." The City, just as the State and other non-federal governmental entities, is an entity capable of holding a legal or beneficial interest in property, and certainly has

such interest in its tax revenue, for all the reasons discussed above. Furthermore, the term "includes" is an expansive term, not one of limitation. *See Webster's Third New International Dictionary*, p. 1818 ("include"—definition 2(a)); *see also Boyle*, 129 S. Ct. at 2243. Nor has any Circuit agreed with Hemi's position on this issue, including the Sixth Circuit in *Fawaz*, *supra*.

In *Anza*, this Court indicated that the State would be a proper party to sue under RICO, which comports with the underlying policy of RICO to authorize private attorneys generals to vindicate their interests. 547 U.S. at 460 (citing *Holmes*, at 269-70); *see also* 547 U.S. at 469 (Thomas, J., concurring in part and dissenting in part) ("Certainly, New York can sue here and vindicate the law, . . ." but also noting that if multiple plaintiffs are direct victims of a tort, "it would be unjust to declare some of their lawsuits unnecessary"); *cf. Georgia v. Evans*, 316 U.S. 159, 162-63 (1942) (including a State as a "person" within section 4 of the Clayton Act); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906) (the city was a person within the meaning of the Antitrust Act and was injured in its property, at least, if not in its business, of furnishing water, by being led to pay more than the worth of the pipe). *See generally* Hoffman, *supra*, at 180-85 (summarizing the legislative history and reasons supporting why state and local governments are included in the RICO "person" including to rid government, as well as business of corrupt influences, and the existence of RICO's liberal construction clause, purpose clause and broad statutory language, which all

indicate that it should not be limited to private plaintiffs, and the antitrust laws' similar inclusion).

For all these reasons, therefore, Hemi's arguments fail.

POINT II

HEMI'S FRAUDULENT SCHEMES CAUSE DIRECT INJURY TO THE CITY, AS RECOGNIZED IN *ANZA v. IDEAL STEEL SUPPLY CORP.*, 547 U.S. 451 (2006).

Hemi's secondary argument is that the City is not a directly injured party (Pet. Br., Pt. III). Hemi is wrong. The City's injury does not derive from an injury to another and the City suffers injuries for which only it can recover.

(1)

In *Anza*, this Court rejected extension of RICO standing to a corporation which alleged that a business competitor did not charge New York State sales tax to cash-paying customers. Although *Anza* does not require plaintiffs to show that the injurious conduct is the sole cause of the injury asserted, *Anza* held that proximate cause considerations require "some direct relation" between the injury alleged and the injurious conduct. *Anza*, 547 U.S. at 456 (quoting *Holmes*, 503 U.S. at 269). In addition to finding that the lowering of prices by the business competitor was distinct from the alleged RICO violation (defrauding the State, the direct victim), this Court also pointed to the difficulty of ascertaining

damages caused by some remote action and the possibility of other factors contributing to the competitor's lower prices and the plaintiff's lost sales. *Id.*, 547 U.S. at 458.

In contrast to the indirect nature of the injury to the business competitor, the *Anza* Court recognized that the State of New York was "[t]he direct victim" which was being defrauded and that the State lost tax revenue as a result. *Id.* at 458, 460 (citing *Holmes, supra*).

Here, the City stands in the same position as the State did in *Anza*. In particular, as this Court stated (547 U.S. at 460):

> The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims (citation omitted). . . . If the allegations [of defrauding the State of New York out of a substantial amount of money] are true, the State can be expected to pursue appropriate remedies. The adjudication of the State's claims, moreover, would be relatively straightforward; while it may be difficult to determine facts such as the number of sales Ideal lost due to National's tax practices, it is considerably easier to make the initial calculation of how much tax revenue the Anzas withheld from the State. There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

See also Sedima, 473 U.S. at 496.

In this case, the City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations (the predicate acts of mail and wire fraud in furtherance of a scheme to defraud the City of taxes). Accordingly, as the Circuit recognized, any recoverable damages occurring by reason of a violation of § 1962(c) (a specific dollar amount for each pack of cigarettes sold without complying with the Jenkins Act) flow from the scheme to defraud the City of use taxes, which is at the heart of the alleged predicate acts of mail and wire fraud (Pet. App. 26a, citing *Sedima*, 473 U.S. at 497).

Notwithstanding the above, Hemi argues that the only directly injured parties are either the customers or the State, "with any injury to the City flowing from their misfortune" (Pet. Br., p. 31 & n.22, citing the dissenting opinion which characterized the City as, "at best[,] an expectant gratuitous donee of information from the State" (Pet. App. 66a-67a)).

By citing Judge Winter's dissent, Hemi reveals that it has confused two issues — the dissent was concerned with whether the omissions or misrepresentations were made directly to the City, not with whether the City was directly injured. As detailed above, the City imposes its own cigarette excise tax and the tax is owed directly to it (*see* N.Y. Unconsol. Law § 9437; N.Y.C. Admin. Code § 11-1302(f)). Hemi's argument that only the State, and not the City, is harmed is simply wrong on the facts.

The fact that the State may also be injured by the loss of its tax does not change the analysis. As the Circuit

recognized, "the City's alleged injury of lost tax revenue is directly caused by defendants' alleged schemes. That New York State may also have been injured by defendants' alleged schemes does not make the City's injury any less direct; the City is owed a certain amount of taxes independent of any amount owed to or collected by the State" (Pet. App. 26a-27a); *see also Anza*, 547 U.S. at 469 (Thomas, J., concurring in part and dissenting in part) (indicating that New York could sue, but also noting that if multiple plaintiffs are direct victims of a tort, "it would be unjust to declare some of their lawsuits unnecessary").[20]

Hemi is intermingling an entirely different concern, *i.e.*, the issue of reliance, or to whom a misrepresentation or omission is made. The dissent below focused on the fact that Jenkins Act reports were, under the language of the Act, provided to a "State," not the City, so that in the dissent's view any omissions were omissions or misrepresentations made to New York State. Apart from the fact that the City pleaded the existence of a joint agreement with the State for administering tobacco taxes, the question of to whom a misrepresentation must be directed to support a mail fraud claim has been resolved in the City's favor by the unanimous decision in *Bridge*, *supra*, contrary to Hemi's claims (Pet. Br., p. 31).

20. *See also RWB Servs., LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688 (7th Cir. 2008) ("existence of multiple victims with different injuries does not foreclose a finding of proximate cause"; nor is it dispositive that the scheme envisioned defrauding another entity as well, who could also potentially bring a RICO claim).

In *Bridge*, this Court clarified that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Bridge*, 128 S. Ct. at 2145. This Court explained that, not only is reliance not an element of a civil RICO claim based on mail fraud, but also reliance may not be brought in through the back door in a proximate cause analysis under RICO because establishing reliance on fraudulent misrepresentations "has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance." *Id.* at 2142.

Hemi's argument that "injury to government in its sovereign capacity is always indirect" (Pet. Br., pp. 32-34) is essentially a rehash of its arguments that the City has not suffered an injury to its business or property. That argument fails for all the reasons discussed above (*ante*, Pt. I).

Hemi's brief fails to mention its acts of mail and wire fraud. Not only does a violation of the Jenkins Act, by itself, constitute mail fraud, but the systematic scheme to defraud the City of tax revenue encompassed numerous other actions, including affirmative representations and advertisements promoting tax evasion and concealment, *e.g.*, the statements that Hemi was not required to file purchase information with any taxing authority and that all sales were "tax-free," and the shipments of the

cigarettes (*cf. Anza*, 547 U.S. at 487 (Breyer, J., concurring in part and dissenting in part) (marking as relevant distinction that National did not tell its customers, "We shall not pay sales taxes."). *Cf. Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (in antitrust case, "Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'").

Furthermore, contrary to Hemi's and the dissent's misapprehension, the predicate racketeering acts in this case are not the Jenkins Act violations, but rather the mail and wire fraud (Pet. App. 31a-32a). *See, e.g., Pasquantino, supra*; *Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); *Porcelli v. United States*, 303 F.3d 452 (2d Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003); *see also United States v. Melvin*, 544 F.2d 767 (5th Cir. 1977) (Jenkins Act violations constitute mail fraud); *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975) (same). Simply stated, the harm does not turn on the State allegedly "gratuitously" giving the City information about the sales, rather the harm is predicated on the acts of mail and wire fraud.[21]

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21. In any event, the underlying premise of the "gratuitous" characterization is wrong – the State and City have entered into ongoing agreements for the administration and collection of cigarette taxes through the sharing of information (Circuit Jt. App.

(Cont'd)

Thus, as the Circuit found, the City's alleged injury is not derivative of the State's injury because "Though the City and State are injured by the same activity, the City's injury does not depend on the State being injured" (Pet. App. 31a). The City is alleged to be the target of the scheme because Hemi's business plan was to sell cigarettes in such a way as to allow consumers to evade New York City's taxes. "That the State may also have been targeted by defendants' schemes does not change the result because there is no precedent suggesting that a racketeering enterprise may have only one 'target,' or that only a primary target has standing" (Pet. App. 31a). "The fact that defendants have no statutory duty to the City under the Jenkins Act does not make the City's alleged harm from the mail and wire fraud violations derivative, unforeseeable, or any less direct" (Pet. App. 31a).

In *Anza*, this Court also directed the courts to consider the "motivating principle[s]" behind the directness component of the proximate-cause standard in RICO cases. *Anza*, 547 U.S. at 458. These include "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* at 458. Stated another way, "the less direct an injury

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(Cont'd)

A1000-04, reproduced *ante*, p. 6 n.6). The Joint Tax Agreement obligates the City and the State to provide each other with all information relevant to the collection of cigarette taxes, including "information . . . which may result in additional cigarette tax revenue to the State or City" and "all violations of Article 20 of the [State] Tax Law or Chapter 13 of title 11 of the [City Administrative] Code" (*id.*).

is, the more difficult it becomes to ascertain the amount of plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. This remoteness concern is heightened when RICO suits are brought by economic competitors seeking damages for lost sales because those types of claims, "if left unchecked, could blur the line between RICO and the antitrust laws." *Anza*, 547 U.S. at 460. *See also Holmes*, 503 U.S. at 269-70 ("directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.").

No such remoteness concerns are present here. There is no more directly injured party who could bring suit as to the fraud to evade the City's cigarette excise tax, although the State may, as noted, have its own action for its own tax. Nor is there a risk of duplicative recovery, another of the concerns expressed in *Anza*. *See also Bridge*, 128 S. Ct. at 2144 (noting that "unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue").

Indeed, the Second Circuit's opinion contains a thorough examination of proximate causation and its findings fully comport with the "underlying premises" set forth in *Holmes* and *Anza* (Pet. App. 28a). With respect to "the factual difficulty of measuring indirect damages and distinguishing among distinct independent causal factors, in this case, measuring the

damages is as simple as counting the number of cigarette packs sold by defendants to New York City residents without complying with the Jenkins Act" (Pet. App. 28a).

"Moreover, the fact that the cigarette purchasers may be partially to blame - either because they were not aware of their reporting duties or because, as part of the alleged RICO conspiracy, they were intentionally hiding the fact of their purchases - does not defeat proximate causation," given that defendants were "a substantial factor in the sequence of events that caused the loss" (Pet. App. 28a-29a). The Circuit aptly recognized:

> A contrary rule would effectively require that a plaintiff's injury be caused by only one source, and, as this is often not the case, it would operate to insulate from liability defendants who scheme with others in violation of RICO [a result clearly not envisioned by Congress]. Here, defendants' actions are clearly alleged to be a substantial factor in the City's loss.

(Pet. App. 29a-30a).

The Circuit also recognized that the *Holmes* factor of the complexity of apportioning damages among plaintiffs was not implicated here, because "[o]nly the City can claim loss of the City's use taxes. To the extent that the State of New York is also aggrieved by defendants' actions, it would have separate damages because it charges separate taxes. *See* N.Y. Tax Law §§ 471, 471-a" (Pet. App. 30a). Moreover, another reason highlighted by *Holmes* for requiring a direct injury is

the expectation that those directly injured will litigate their claims in order to vindicate the law. 503 U.S. at 269. In the instant case, although the State may also seek to sue to vindicate the law, the City should not have to rely on the State to enforce the RICO laws, where the City's injury in the form of lost taxes is just as direct as any comparable injury of the State (Pet. App. 30a).

Additionally, as alleged in the complaint, which must be accepted as true for purposes of this dismissal motion, *see Bridge*, 128 S. Ct. at 2135 n.1, "there are no speculative steps in [the] chain of causation" (Pet. App. 30a). Thus, when defendants fail to comply with the Jenkins Act, defendants deprive both the City and the State of information needed to collect taxes from the in-State and in-City cigarette purchasers. The City has alleged that, based on its agreement with the State, it "will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act reports" (Pet. App. 30a-31a).

The direct injury finding is consistent with RICO's purposes - to expand enforcement beyond federal prosecutors with limited public resources - to turn victims (here, the City) into prosecutors as private attorneys general seeking to eliminate illegal activity by parties who engage in mail and wire fraud by blatantly violating the Jenkins Act. *See Rotella*, 528 U.S. at 557 (acknowledging that the very "object of civil RICO is . . . to turn [victims] into prosecutors, private attorneys general dedicated to eliminating racketeering

activity" (quotation marks and citation omitted)).[22] It is also consistent with Congress' intentions to stop cigarette tax evasion and smuggling through mail and wire fraud, purposes consistently evinced not only in RICO, but also in the Jenkins Act and the CCTA.[23]

Allowing this RICO action to go forward, moreover, will not just affect the City of New York, but all localities who may have more limited resources and who need the benefit of RICO to pursue fraudulent systematic tax evasion schemes. Congress clearly directed expansive remedial relief in the form of treble damages.

In attempting to fall within the concerns expressed in *Anza* and *Holmes* about speculative damages and unwieldy apportionment issues in cases involving indirect injuries, Hemi makes several new, misleading arguments (Pet. Br., pp. 35-38).

First, Hemi argues for the first time in this case that, through "better distribution (using the Internet) and better pricing" (Pet. Br., p. 36), it was able to attract

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22. *See also Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (holding that Cook County, not a group of taxpayers, was directly injured by bribery scheme where individual paid money to employees in order to obtain lower property tax assessments for his clients); *City of Chicago Heights v. LoBue*, 841 F. Supp. 819 (N.D. Ill. 1994) (City of Chicago Heights, the injured party whose funds allegedly were used to garner bribes and kickbacks for the defendants, was the proper party to bring RICO suit).

23. While New York State has its own RICO statute, *see* N.Y. Penal Law §§460.00-460.80, it does not include mail fraud as a predicate offense and does not contain a treble damage remedy.

customers. Indeed, the brief repeats these phrases constantly (*id.*, *see also* pp. 21, 31, 36, 37), as if repeating the phrases makes them true on this 12(b) pleading motion. In any event, the City is not Hemi's business competitor – it is a taxing authority.

Moreover, unlike in *Anza*, where this Court reasoned that competitive factors other than price may have contributed to the plaintiff's injury, the record here is clear, as evidenced by Hemi's own statements: Hemi affirmatively advertised that there is "no tobacco tax," that it did not report sales to the State taxing authorities and was "not required to do so," and that its cigarettes are "tax-free" (*see ante*, pp. 7-8). Accordingly, Hemi has admitted that prices are lower because State and City taxes are not and will not be included in the price.

Hemi's further argument that the measure of damages is speculative because N.Y.C. Admin. Code, § 11-1302(b)(1) contains an exception for sales of less than 400 cigarettes (*i.e.*, about two cartons) (Pet. Br., p. 37) is specious. Like N.Y. Tax Law § 471-a, the exception provides that the taxes imposed do not apply to the "the use, otherwise than for sale, of four hundred cigarettes or less brought into the city, on or in the possession of, any person." N.Y.C. Admin. Code, § 11-1302(b)(1). That exemption only applies to cigarettes purchased in person, not if they are shipped into the City by mail.

In sum, had Hemi chosen to conduct its business in compliance with its statutory obligations and not premised its business plan on a scheme to defraud and tax evasion, this RICO case would not have been necessary. However, as this Court recognized with

respect to the State in *Anza*, here, the City has stated a claim against Hemi for its blatant scheme to defraud the City of its cigarette excise tax revenue and RICO provides the only remedy available to the City.[24]

(2)

Hemi's final argument is that the New York Court of Appeals has determined that the City has only sustained indirect derivative injuries and that such holding should influence this Court (Pet. Br., Pt. III(D)). Hemi's argument lacks merit.

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24. Hemi contends that the City made a "remarkable concession" in its brief opposing certiorari that "its injury is due to the individual taxpayers' failure to voluntarily pay use taxes to the City" (Pet. Br. p. 37). Hemi takes the quotation out-of-context, given that the City was simply quoting the Second Circuit's opinion, as the City's record citation indicates, which opinion initially cited a number of other factors (Pet. App. 11a). In any event, the City has never disputed that it is the purchaser who owes the tax, but that is not the point. As discussed above, this Court recognizes that the right to collect tax revenue is property in the government's hands, regardless of whether it has yet been collected. *See Manning v. Seeley Tube & Box Co.*, *supra*. Hemi's mail and wire fraud, including its failure to file Jenkins Act reports and affirmative misrepresentations, has injured the City directly by the City's lost cigarette excise tax revenue. In both federal RICO and antitrust cases, "proximate cause is not . . . the same thing as a sole cause," and it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a "substantial factor in the sequence of responsible causation." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (RICO), *modified on other grounds by* 30 F.3d 1347 (11th Cir. 1994; *see also Anza*, 547 U.S. at 456. Finally, as noted above, the City alleged that some purchasers had stated they were misled by the claims of "tax-free" cigarettes (*ante*, p. 8 n.8, Circuit Jt. App. A1022, *see* A118-25, A645).

After the Circuit had ruled on the RICO issues, including the ones at issue now, the Circuit, *sua sponte*, certified two pure state law questions. Insofar as is relevant here, the New York Court of Appeals considered a pure state law issue under a specific state consumer protection statute, *i.e.*, did the City have standing to bring a claim under N.Y. Gen. Bus. Law § 349(h), New York's consumer protection statute which governs "Deceptive Acts and Practices." That statute requires that a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice. *City v. Smokes-Spirits.com*, 12 N.Y.3d 616, 621 (N.Y. 2009).

Relying on its recent precedent holding that the consumer protection statute must be narrowly construed under state law, *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 N.Y.3d 200, 207, 818 N.E.2d 1140, 1144 (N.Y. 2004), to bar derivative actions "when the loss arises solely as a result of injuries sustained by another party," the New York Court of Appeals held that the City failed to establish standing because "its claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet." 12 N.Y.3d at 622. The Court of Appeals emphasized its findings in the *Blue Cross* decision as to: the lack of any clear indication from the Legislature that derivative injuries were actionable under Gen. Bus. Law § 349(h); its concern with expanding section 349 to permit "a tidal wave of litigation against businesses that was not

intended by the Legislature"; and that its ruling was "in accord with several other courts that recognize a remoteness bar to recovery under their state consumer protection statutes" (12 N.Y.3d at 622, citations omitted).

The New York State Court of Appeals did not consider RICO nor the City's direct injury in the form of lost cigarette excise tax revenue arising from the systematic deliberate business scheme to defraud the City of tax revenue by the alleged criminal acts of predicate mail and wire fraud. Such revenues are owed directly to the City, not to the State or to the consumer, neither of whom could sue for the City's injuries. Furthermore, under Hemi's theory, if, *arguendo*, there was no provision in the Gen. Bus. Law authorizing the State Attorney General to sue, then the New York Court of Appeals' decision would also effectively bar the State from suing for its injury under RICO, a proposition directly belied by this Court's *Anza* decision.

Finally, in light of RICO's broad language, liberal construction and distinct purposes to combat organized crime in all its forms and to foster enforcement by private attorneys general, Hemi's reliance on a state law decision, which at the Circuit's request considered City standing under a narrow state consumer protection statute, is unavailing. *See Bridge*, 128 S. Ct. at 2143 (reliance is not an element of a civil RICO claim based on mail fraud; furthermore, it may not be brought in through the back door in a proximate cause analysis under RICO because establishing reliance on fraudulent misrepresentations "has no place in a remedial scheme keyed to the commission of mail fraud, a statutory

offense that is distinct from common-law fraud and that does not require proof of reliance.")[25]

CONCLUSION

For all the above reasons, the order below should be affirmed. In accord with the statute and this Court's precedent, the City has stated a RICO claim sufficient to withstand the motion to dismiss and this action should proceed.

Respectfully submitted,

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25. The only authority cited by Hemi are two inapposite Circuit cases which apply claim preclusion in the classic situation of a full adjudication of a state law claim which rests upon the same facts and, where following full opportunity to litigate, reaches a conclusion which is given binding effect in the federal courts. Hemi does not contend that such is the case here, as evidenced by its *cf.* citation.

REPLY BRIEF

No. 08-969

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In The
Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. Respondent's "Counter-Statement of the Case" Does Not Alter RICO's Injury to "Business or Property" Standing Limitation.

Respondent dedicates a quarter of its response to a "Counter-Statement of the Case" filled with ad hominem attack against Petitioner Hemi. Amici's brief is replete with similar rhetoric, yet devoid of a single record citation.[1] Together they weave a web of hypothetical evils including "contraband" cigarettes, smuggling, corruption of government officials and terrorism, all of which they claim will run rampant if RICO's hammer cannot be used to collect taxes, trebled no less, from a business that never owed them. But Respondent did not allege these recent claims in its original complaints, and of the multitude of claims it did allege, all have been decided against Respondent save for the one before this Court.

Respondent's only specific remaining complaints are that Hemi maintains its sales did not implicate the Jenkins Act requirement that it provide customer lists

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[1] Amici describe Hemi's repeatedly successful defense of its business as "shameful". Brief of the States of Indiana, et al. in Support of Respondent corrected by filing dated September 29, 2009 ("amici brief") at 3. Similar vilification has not succeeded in connection with other overreaching civil RICO claims. *Compare Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001) (affirming dismissal of civil RICO claims against Amway) *with* http://www.amquix.info/blakey.html (expert report in support of Procter & Gamble at pages 1 and 2: "It is my opinion that the Amway business is run in a manner that is parallel to that of major organized crime groups, in particular the Mafia").

to the state of New York,[2] and that Hemi's websites contained statements that "sales are 'tax free'" (*e.g.*, Response at 1, 7) or that "no tobacco tax" was payable on the purchase (*e.g.*, Response at 7)[3]. But Hemi did not owe Respondent reports listing which City residents bought cigarettes.[4] Instead, "[t]he City was at best an expectant gratuitous donee of information from the State" *City of New York v. Smokes-Spirits.com*, 541 F.3d 425, 460 (2d Cir. 2008)(Winter, J., dissenting).[5] And Respondent concedes that Hemi's

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[2] Conspicuously absent from the list of governments participating as amicus are the State of New York and the Federal Government.

[3] Only some of the cited pages are from Petitioner's websites.

[4] The Amended Complaint's specific allegations are particularly telling: "Defendants' failure to file Jenkins Act reports is materially deceptive and misleading to New York City consumers." Amended Complaint ¶ 107, Second Circuit Court of Appeals Joint Appendix ("Cir. Jt. App".) A913. Yet Jenkins Act reports are not directed to consumers nor to the City (Complaint ¶¶ 45-47, Cir. Jt. App. A810-11), nor even seen by them. Therefore, the filing or non-filing of such reports cannot be deceptive or misleading to them. Hemi also disputes that the Jenkins Act applied to its on-reservation sales.

[5] "Absent the Jenkins Act, appellees would have owed no duty to disclose their sales to anyone, and their failure to disclose could not conceivably be deemed fraud of any kind. Appellees owe no taxes to the City. The tax evasion is by the purchasers of the tobacco products. Even with the Jenkins Act, which requires reporting only to state authorities, appellees have no duty to disclose anything to the City. Indeed, conspicuously absent from the City's pleadings is any claim brought pursuant to the Jenkins Act itself, rather than RICO, seeking enforcement of the Jenkins Act, effectively an admission that the Act does not protect the City." *City of New York*, 541 F.3d at 460 (Winter, J., dissenting).

"sales" were tax free,[6] and "no tobacco taxes" were payable on sales.[7] Only the City possessory tax is at issue: a tax owed not by Hemi, but by non-litigant third parties.[8] As to those taxes, Petitioner Hemi's websites advised purchasers to contact state authorities.[9] Indeed, it would be unreasonable for any customer, much less Respondent, to argue city residents are absolved of tax obligations based on a vendor's Internet web site. *Cf. United States v. Boyle*, 469 U.S. 241, 252 (1985)("The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing"). Hemi competed in

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[6] Response at 49: "Hemi has admitted that prices are lower because State and City taxes are not and will not be included in the price;" and at 50 n.24: "the City has never disputed that it is the purchasers who owe the tax."

[7] Response at 4: "Under federal law, sellers located out-of-state may not be required to purchase and apply New York tax stamps;" *see also* note 8.

[8] "It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer," N.Y.C. Admin. Code § 11-1302(a)(3).

[9] *E.g.*, Cir. Jt. App. A853-54: "It is the responsibility of the visitor/ ustomer of CigarettesSpecials.com to comply with any laws regarding the purchase and use of any cigarettes in their State. In order to determine the applicable limits on purchases or taxing responsibilities, if any, imposed by your particular state, you may want to contact your state authorities." (Emphasis in original); *see also* Cir. Jt. App. A850, A936 and A1059 (same notice appears on FreeCigs4U.com and BuyDiscountCigarettes.com).

the market.[10] It did so charging prices unaffected by New York City because Hemi did not owe, and did not pay, any of the taxes at issue. In these circumstances, principles of competition:

> [s]uggest that RICO does not permit private action based solely upon this competitive type of harm, *i.e.*, harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's 'proximate-cause' requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm is not 'direct.'

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 at 482-483 (Breyer, J., concurring).

The District Court dismissed all of Respondent's claims.[11] The Second Circuit affirmed the majority of

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[10] Annice E. Kim et al., Smokers Beliefs and Attitudes about Purchasing Cigarettes on the Internet, 121 PUB. HEALTH REP. 594-602 (Sept./Oct. 2006) at 595 (73% of smokers who purchase online do so for the convenience).

[11] Respondent never alleged violation of NY CLS Pub Health § 1399-ll, which regulates shipment and delivery of cigarettes, not

the district court's holdings on RICO and state law claims.[12] The New York State Court of Appeals, on the Second Circuit's certification of two remaining state law claims, ruled unanimously in favor of Hemi, confirming that Respondent's claims were "entirely derivative" of injuries allegedly suffered by others. No court has ever held that Hemi's business model was fraudulent or illegal.

Yet even if taken as true, Respondent's ad hominem attacks do not magically transform Respondent's alleged loss of sovereign "opportunity" into a RICO injury to "business or property." It is not Hemi's business model that brings the parties before this Court. Instead, it is Respondent's attempt to expand legislation beyond its scope and the intention of its drafters that has forced petitioner Hemi and its owner to defend its operations before this Court, the United States Court of Appeals, the New York State Court of Appeals, and in the United States District Court.

Internet sales. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

[12] Respondent incorrectly claims that the Court of Appeals "reinstated the majority of the federal RICO claims" (Response at 10). The Court of Appeals affirmed dismissal of half of Respondent's RICO claims. *City of New York*, 541 F.3d at 451 (2d Cir. 2008)("we affirm the District Court's finding that the City failed to sufficiently allege a functioning unit with respect to the Hemi Group association-in-fact enterprise").

II. RICO's "Injury to Business or Property" Limitation Precludes Recovery for Injury to a Sovereign Tax Collection Interest.

A. Respondent does not dispute the historic context and legislative history of RICO's "injury to business or property" limitation.

Respondent and amici do not deny that RICO's injury to "business or property" requirement was taken directly from the Antitrust Acts. *Anza*, 547 U.S. 451 (2006)(discussing RICO's roots in antitrust law). They nevertheless urge the Court to ignore RICO's roots; RICO's specific language; canons of construction applied when Congress incorporates language from prior law; this Court's use of antitrust precedent to interpret RICO; the language's context in RICO; and the historical context of this restriction's adoption by Congress.

Instead, Respondent and amici propose that the Court simply apply RICO's "liberal construction clause." Yet the "liberal construction clause" is not a free pass permitting all claims. Instead it is a "tie breaker" applied only if the statute is unclear, and the context does not resolve the interpretation issue. *Reves v. Ernst & Young*, 507 U.S. 170, 189 (1993)(Souter, J., dissenting)("Congress has given courts *faced with uncertain meaning* a clear tiebreaker in RICO's 'liberal construction' clause" (emphasis supplied)). This Court consistently has rejected the "all claims are allowed" analysis even given the liberal construction clause. *E.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992)(noting the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover").

The Court need not reach the RICO "tie breaker" to interpret the meaning of "business or property." It was clear at the time Congress adopted the phrase from antitrust law into RICO. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *accord Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)(in the antitrust laws, "[t]he phrase 'business or property' also retains restrictive significance . . . . Congress must have intended to exclude some class of injuries by the phrase 'business or property'"). Moreover, contrary to Respondent's and amici's assertions, the *Hawaii* decision was not some "paradigm shift" in law that surprised legal scholars and legislators alike.[13] Instead, it demonstrates the interpretation of "business or property" existing at exactly the time Congress considered and passed RICO: "[u]nless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly." *Hawaii v. Standard Oil Co.*, 431 F.2d 1282, 1285 (9th Cir. 1970); *accord Hawaii*, 405 U.S. at 264 (if "business or property" is to include sovereign interests "we should insist upon a clear expression of a congressional purpose to make it so") and at 262 ("Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected").

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[13] *E.g.*, amici brief at 15 n.3 (accusing Petitioners of "playing 'gotcha'").

Had Congress not intended to limit RICO standing, it would have allowed standing for any "injured" individual or entity. Instead, Congress limited "person" to "any individual or entity capable of holding a legal or beneficial interest in property."[14] It then limited standing to any "person injured in his business or property." As amici recognize, "'business or property' means just what it says, and nothing more or less." Amici brief at 7. Ignoring this wisdom, amici say "business" means "government," and they join Respondent in arguing "property" means everything. Congress knew better.

B. Antitrust case law guides RICO interpretation.

The RICO language at issue here came straight out of antitrust law, unchanged. As this Court has confirmed:

> [C]ongressional use of the [Sherman Act] § 7 language in § 4 [of the Clayton Act] presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation' . . . . The reasoning applies just as readily to § 1964(c). We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

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[14] 18 U.S.C. § 1961(3).

Holmes, 503 U.S. at 268 *citing Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983)(internal citations omitted). Antitrust precedent confirms that injury to sovereign interests falls outside the range of injuries cognizable under RICO. Respondent's and amici's argument that this Court should ignore its historic reliance on antitrust law to guide RICO interpretation must be rejected.

C. A sovereign interest in uncollected taxes owed by non-litigant third parties is neither "business" nor "property."

1. The phrase "business or property" must be read in the disjunctive.

Respondent does not dispute that the disjunctive "or" in the phrase "business or property" requires both "business" and "property" to be given their independent and ordinary significance. *Cf. Reiter*, 442 U.S. at 338-39.

2. Uncollected taxes owed by third parties are not an injury to business.

Respondent all but concedes that it alleged no injury to its "business:" it does not separately address the issue and refers throughout its brief primarily to alleged injury to its "property" alone. *E.g.*, Response at 15, 16, 21, 24, 25.[15] Amici (citing only the Oxford English Dictionary) include a one paragraph argument that "a governmental entity engages in 'business' when

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[15] But see Response at 1.

it performs its ordinary work." Amici brief at 7. Neither addresses Petitioners' case citations in the opening brief. *E.g., Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 86 (S.D.N.Y. 1964). Moreover, this Court consistently has distinguished between government as sovereign and government acting in a business capacity. *E.g., Camps Newfound / Owatonna v. Town of Harrison*, 520 U.S. 564, 594 (1997)("Maine's tax exemption . . . must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision"); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)(city "was injured in its property, at least, if not in its business of furnishing water"). Had Congress understood "business" to mean "government," it surely would have said so. *Cf. Hawaii*, 405 U.S. at 264 (if "business or property" is to include sovereign interests "we should insist upon a clear expression of a congressional purpose to make it so").

3. Uncollected taxes owed by third parties are not an injury to property.

Respondent admits taxation is an incident of sovereignty and not a property right. Response at 25.[16] Amici's "19th Century" claims notwithstanding, this Court continues to recognize the distinction. *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000)(distinguishing between federal government's role as sovereign and as property holder).

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[16] *Bresson v. Comm'r*, 213 F.3d 1173, 1178 (9th Cir. 2000)("the right to collect taxes is among the most basic attributes of sovereignty").

The injury Respondent seeks to vindicate is not an interest in money, a choate tax obligation, or even an unperfected tax lien, but instead the sovereign "opportunity" to collect taxes. Response at 16 (the "ability to collect" tax revenue is "the City's property"); City of New York Br. Opp'n to Petition for Writ of Certiorari at 15 ("Petitioners did not owe the City taxes, rather, they defrauded the City out of an opportunity to collect taxes from those who did owe them"). Nevertheless, Respondent argues that because sovereign tax authority can be exercised *to create* a property right, the sovereign opportunity to tax *is itself* RICO "property." Respondent is incorrect.

The sovereign "opportunity" to collect a tax can be used to create a tax "debt" by means of an assessment. Michael I. Saltzman, *IRS Practice And Procedure, Liens And Levies*, Para. 14.01, (2nd ed., Warren Gorham & Lamont 2002) ("*Assessment creates* quite a different kind of debt from the one a debtor owes to the general creditor" (emphasis supplied)). Assessment is "the calculation or recording of a tax liability." *United States v. Galletti*, 541 U.S. 114, 122 (2004). In *Galletti*, Justice Thomas, writing for a unanimous Court, discussed assessment methods, including self-assessment (required under Respondent's cigarette possession tax):

> The Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment. . . . Where the taxpayer fails to file the form of return or miscalculates the tax due, as in this case, the Secretary can assess all taxes (including interest, additional amounts,

> additions to the tax, and assessable penalties), by recording the liability of the taxpayer in the office of the Secretary. In other words, where the Secretary rejects the self-assessment of the taxpayer or discovers that the taxpayer has failed to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books.

Id. at 122 (internal quotations and citations omitted). *See also Hibbs v. Winn*, 542 U.S. 88, 117 (2004)(Kennedy, J., dissenting)(The recordkeeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method").

The assessment is not the sovereign (non-property) "opportunity" to tax. Instead, it is the mechanism used to create a property interest:

> Some machinery must be provided for applying the rule [of taxation] to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment . . . . Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives.

Bull v. United States, 295 U.S. 247, 259 (1934); *cf. United States v. New Britain*, 347 U.S. 81, 86 (1954)(rejecting the notion that "a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the

amount of the tax, assessment, etc., is determined"). Until assessment, the sovereign interest is inchoate. *New Britain*, 347 U.S. 81, 84 (1954)). An inchoate interest "affords no definite or enforceable property right." *Austin v. Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988)(citation omitted); *cf. United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 89 (1963)(the sovereign's interest in tax income is inchoate until "there is nothing more to be done to have a choate lien--when the identity of the lienor, the property subject to the lien, and the amount of the lien are established").

Manning v. Seeley Tube & Box Co., 338 U.S. 561 (1950) is not to the contrary. There the Court held that the point at which the Commissioner could charge interest on a tax deficiency is the date of self-assessment when "the original return was to be filed." *Id.* at 565. The Court was not addressing sovereign "opportunity" to tax, but rather a complex section of the federal carry-back provisions.[17] In *Manning*, the self-assessment created a debt upon which interest could accrue, with the amount of interest determined "when the Commissioner assesses a deficiency."

Assessment, for purposes of a possessory tax, does not occur upon taking of possession. As this Court has recognized:

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[17] *Id.* at 567-68 ("Although it is true that for many purposes the carry-back is equivalent to a *de novo* determination of the tax, our conclusion that this section does not retroactively alter the duty of a taxpayer to pay his full tax promptly is amply supported by § 3771 (c) of the Code. That section, an integral part of the carry-back provision, prohibits a taxpayer who does pay a tax which is subsequently abated by a carry-back from claiming interest from the Government for the intervening period").

> Although [Montana's tax] purports to be a species of property tax--that is, a 'tax on the possession and storage of dangerous drugs,' -- it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed. Indeed, the State presumably *destroyed* the contraband goods in this case before the tax on them was assessed.

Department of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994)(citations omitted emphasis in original). Instead, assessment takes place upon either self-assessment, or government action to assess. The possessory tax law at issue here provides for both. *See* Section II(C)(4), *infra*.

No one disputes Respondent's sovereign power to impose possessory taxes on its residents. But until that power is exercised through assessment, no "property" interest is created. *Cf. Cleveland*, 531 U.S. at 23 (2000)("Even when tied to an expected stream of revenue, the State's right of control does not create a property interest"). This analysis applies to Respondent's argument by analogy to the Contraband Cigarette Trafficking Act ("CCTA"). 18 U.S.C. § 2341 *et seq.* Specifically, Respondent claims that by including the CCTA as a RICO predicate offense, Congress included injury to sovereign interests in RICO's existing "injury to business or property" standing limitation. Yet CCTA does not impose payment of taxes due as a penalty. 18 U.S.C. § 2344. And contrary to Respondent's claim, CCTA's legislative history confirms it was added as a RICO offense not to remedy injury to sovereign "opportunity," but instead to provide "additional statutory basis for the Department of Justice to interdict organized cigarette

racketeering." H.R. Rep. 95-1629 at 5 (1978). Much more instructive on the issue is that Congress has never included "tax evasion" as a RICO predicate crime. 18 U.S.C. § 1961.

Respondent's citation to *Pasquantino v. United States*, 544 U.S. 349 (2005) is similarly flawed. In *Pasquantino* this Court "express[ed] no view on the related question whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) for a scheme to defraud it of taxes." *Id.* at 355 n.1. Courts that have addressed the issue have dismissed such RICO claims. *Attorney General of Canada v. R. J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001)(Canada cannot bring civil RICO suit for scheme to defraud it of taxes); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1255 (11th Cir. 2003)(same with respect to other foreign governments).[18] Instead, *Pasquantino* was a criminal RICO prosecution for smuggling brought by federal prosecutors against individuals who did not pay Canadian taxes. It was not an attempt to rectify lost sovereign "opportunity" to collect taxes from non-litigant third parties, and civil RICO's "injury to business or property" limitation was not an issue.[19] As Respondent notes, in *Pasquantino* (decided in 2005) the Court cited in a

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[18] The decisions in *Canada* and *Honduras* were based on the revenue rule, which bars enforcement of foreign tax laws. Neither addressed RICO claims to collect taxes from a party who never owed them to begin with.

[19] *Cf. City of New York*, 541 F.3d at 459 n.2 (Winter, J., dissenting).

parenthetical the definition of property in Black's Law Dictionary Fourth Edition (1951): "extend[ing] to every species of valuable right and interest." 544 U.S. at 356. However, the first definition of "property" in the Eighth Edition of Black's Law Dictionary (1999) is: "The right to possess, use, and enjoy a determinate thing . . .; the right of ownership," noting:

> The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.

Id. citing John Salmond, *Jurisprudence* 432-24 (Glanville L. Williams ed., 10th ed. 1947).[20] This distinction is consistent with the uniform rejection of personal injury claims as not being "property" for purposes of RICO standing. *Magnum v. Archdiocese of Phila.*, 253 Fed. Appx. 224 (3rd Cir. 2007); *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir. 2006); *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005)(*en banc*); *cf. Reiter*, 442 U.S. at 339 ("'The phrase 'business or property'

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[20] Respondent also cites Websters (at 21). Webster's Third New International Dictionary, Unabridged, 2002 (available on the Internet) contains a definition consistent with the 1999 definition of property in the current Black's Law Dictionary: "2 a : something that is or may be owned or possessed: wealth, goods; specifically: a piece of real estate" and "2 c : something to which a person has a legal title: an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law."

also retains restrictive significance. It would, for example, exclude personal injuries suffered").[21]

Similarly flawed is amici's attempted reliance on a pending yet unrelated case in which amicus Indiana "used the federal RICO statute to sue former East Chicago Mayor Robert Pastrick." Amici brief at 1, 29-30. The propriety of this argument is questionable. *Dow Chemical Co. v. United States*, 2002 U.S. Dist. LEXIS 11657, at *3-4 (E.D. Mich. May 24, 2002)(amicus "ought not to be permitted to relitigate its own lawsuit").[22] Moreover, Indiana's alleged RICO predicate crime involved theft of money, not lost sovereign "opportunity" to collect that money.[23] Amici brief at 30. Nothing in this case will impair any sovereign from bringing civil RICO claims for "public corruption" that otherwise meet RICO's standing requirements. *Cf. Wilkie v. Robbins*, 551 U.S. 537, 564

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[21] Respondent and amici do not address the argument (Opening brief at 25) that "opportunity" to collect taxes is nothing more than an "expectation" interest that does not qualify as injury to "business or property." *Holmes*, 503 U.S. at 279 (O'Connor, J., concurring in part)("the requirement of injury in one's 'business or property' limits the availability of RICO's civil remedies to those who have suffered injury in fact"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008); *Heinold v. Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987).

[22] *See also American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (Cl. Ct. 1991)(amicus "is thus not a disinterested stranger offering to illuminate a legal issue. . . . [T]he implication is that [amicus'] real interests are as a litigant, not as a friend of the court").

[23] *Indiana v. Pasterick*, No. 3:04-cv-00596-JTM-CAN (N.D. Ind.). Doc. 1 (complaint) at 39, Paragraph VII (B) entitled: "The Predicate Crimes – Violations of 18 U.S.C. Section 2314."

(2007) (extortion involves harm of public corruption by the sale of public favors for private gain). Moreover, amicus Indiana's fear that judgments in its unrelated case "would be vulnerable to attack" misses the point: if based on misapplication of law they should be "vulnerable to attack." Yet that collateral issue is not properly before the Court. Instead, the issue properly before the Court is Respondent's lack of standing to sue a business that never owed it taxes, based on allegations that a sovereign "opportunity" to tax could have yielded unassessed future funds in unspecified amounts from unknown non-party taxpayers for unidentified possession of unknown quantities of cigarettes.

4. The sovereign "opportunity" to collect taxes is not property under New York law.

Respondent confirms that property interests are created and defined by state law, then argues that under New York law, "money is property," quoting the following:

> A city or village *holds the proceeds of taxation* as its *corporate property*. It may use *the moneys received* as it pleases for purposes of local government or for any other purpose *within its corporate powers*.

Response at 24 *citing and quoting Village of Kenmore v. County of Erie*, 252 N.Y. 437, 442 (1930)(emphasis supplied). No one disputes that money received from an assessed tax debt is property. Instead, it is the sovereign "opportunity" to tax, which is not "property" under federal or New York state law that is at issue.

As noted in Section II(C)(3), assessment is required to create a property interest. Respondent's possessory tax requires self-assessment.[24] When a person does not self-assess, there is no assessment and no "property" interest. Yet the government does not assess at this point. Instead, "the commissioner of taxation and finance shall determine the amount of tax due." N.Y. Tax Law § 478; *see also* N.Y. COMP. CODES R. & REGS. tit. 20 § 79.1 (a)-(b). There follows a lengthy process including taxpayer rights to petition for a hearing and further appeal. *Id.* Not until this process is completed is the assessment final and the tax "choate" under New York law. *Cf. Board of Managers v. Pickett*, 159 Misc. 2d 1076, 1078 (N.Y. Sup. Ct. 1994)("A state lien is considered 'choate' when it is perfected in the sense that there is nothing more to be done to have a choate lien" (*citing and quoting New Britain*, 347 U.S. 81, 84 (1954)). Where, as here, state law is specific as to the assessment process, that process must be completed before the tax becomes choate:

> As a result of these state law provisions, we hold that the amounts of the state tax liens at issue here were not established on the date the returns were filed and that state tax liens were therefore not perfected and choate on that date. The returns filed by the taxpayer had not been examined, the taxes owed had not been determined by the commissioner, and the delinquency penalties and interest had not been

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[24] N.Y. COMP. CODES R. & REGS. tit. 20 § 74.5 (b)(2) (2009); *see also* N.Y. Tax Law §§ 471-a - 471-c.

> computed and added to the amount of the tax, all of which is required under state law.

Minnesota v. United States, 184 F.3d 725, 730 (8th Cir. 1999).

Not only were Respondent's potential tax claims never choate, and therefore never "property," state law confirms Respondent's "opportunity" to collect also is not property. *State v. Barclays Bank of N.Y., N.A.*, 76 N.Y.2d 533, 540-541 (1990)(where taxpayer's accountant misappropriated checks payable to State for taxes, "[t]he checks were never actually or constructively delivered to plaintiff. It therefore never acquired a property interest in them and cannot be said to have suffered a loss")(opening brief at 24, ignored by Respondent and amici).

D. A municipality is not a "person" as defined by RICO when the municipality seeks to recover for injury, not to "business or property," but instead to a sovereign interest.

Instead of addressing whether it is a "person" for purposes of a RICO claim *based on injury to sovereign interest*, Respondent argues that the issue is "belated," and in any event irrelevant because Respondent sometimes can be a "person" as defined in RICO. Both arguments are incorrect.

First, Respondent's lack of RICO standing cannot be waived. *United States v. Hays*, 515 U.S. 737, 742 (1995). Second, "the source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted." *White*

Mountain Apache Tribe v. Williams, 810 F.2d 844, 865 n.16 (9th Cir. 1985), *cert. denied*, 479 U.S. 1060 (1987). Petitioners do not argue that government is never a "person" with RICO standing. The argument, which Respondent fails to address, is that because Congress limited "person" to individuals or entities capable of owning "property," Respondent is only a "person" for RICO standing when seeking to recover for an injury to "property." It is not a "person" when it alleges injury to a non-property sovereign interest.

E. Amici's "commercial injury" argument is misplaced.

Amici claim to "focus [their] brief on the reasons why RICO should not be read to require a 'commercial' injury," arguing that such a reading would make RICO inapplicable to losses from government bank accounts through "misappropriation, conversion and embezzlement." Amici brief at 5. To the contrary, "non-commercial" in the context of the issue presented here relates to sovereign (non-property) as opposed to corporate (property) interests. *See United States v. Laton*, 352 F.3d 286, 312 (6th Cir. 2003)("a public and sovereign service . . . will rarely (if ever) be deemed 'actively' 'commercial' in any traditional sense of the terms"). It is beyond dispute that government acts both in a "sovereign," and in a commercial non-sovereign, capacity. *United States v. California*, 507 U.S. 746, 757 (1993). Addressing this "commercial versus sovereign" distinction, this Court has stated:

> Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a

> sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police powers.

Cleveland, 531 U.S. at 23 (2000); *see also Hawaii*, 405 U.S. at 264-65.[25]

That distinction does not affect RICO claims arising from misappropriation, conversion and embezzlement, however, as none involves taking of sovereign "opportunities." *E.g.*, *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143, 149 (1987)(noting RICO "racketeering activity" includes state law felonies and violations of federal statutes prohibiting bribery, embezzlement, obstruction of justice, and interstate transportation of stolen property).

F. Petitioners Did Not Advance a "Floodgates" Argument.

Amici dedicate a significant portion of their argument to propping up, then knocking down a RICO "floodgates" argument that Petitioners never advanced.[26] Nevertheless, placing amici's floodgates

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[25] "Support for this reading of § 4 is found in the legislative history of 15 U. S. C. § 15a, which is the only provision authorizing recovery in damages by the United States, and which limits that recovery to damages to 'business or property.' The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services."

[26] Although Judge Winter criticized the inappropriate expansion of mail and wire fraud concepts inherent in the decision now

argument in context, nineteen States have told this Court that if it allows RICO standing for injury to sovereign interests, they stand ready to press such claims. If ever a floodgates argument were to gain traction this would be the appropriate case.

III. New York City Does Not Have RICO Standing Because Its Alleged Injury Is Indirect.

A. Only directly injured parties have civil RICO standing.

Standing under RICO is determined by proximate causation, not actual "but for" causation. *Holmes*, 503 U.S. at 265-66. Indirect claims do not confer standing. *Anza*, 547 U.S. at 460.

B. Injury to government in its sovereign capacity is always indirect.

The only response offered to this section of the opening brief is Respondent's incorrect claim that it is "a rehash" of the "injury to business or property" argument. Response at 42. Therefore, the argument in the opening brief needs no supplementation, other than to note that Respondent tendered no response to Petitioners' discussion of the "zone of interests" analysis articulated by Justice Scalia in his concurring opinion in *Holmes*:

> The phrase "any person injured in his business or property by reason of" the unlawful activities

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before this Court, that is not a RICO "floodgates" issue. *City of New* York, 541 F.3d at 459-60.

> makes clear that the zone of interests does not extend *beyond* those injured in that respect – but does not necessarily mean that it includes *all* those injured in that respect. Just as the phrase does not exclude normal judicial inference of proximate cause, so also it does not exclude normal judicial inference of zone of interests.

503 U.S. at 288 (Scalia, J., concurring in the judgment)(emphasis in original).

C. New York City's derivative injuries are speculative and too indirect to meet RICO standing requirements.

Respondent alleges that Petitioners injured its "opportunity" to collect taxes in two ways: (1) City residents were misled as to their possessory tax obligations because websites stated "sales are tax free" and "no tobacco taxes;" and (2) the City did not get lists of residents who bought cigarettes because no lists were sent by Hemi to the State. Response at 1, 5, 42.[27] As recognized by Judge Winter, and confirmed by the New York Court of Appeals under the same factual allegations, neither source of injury is direct, and both are speculative.

As to the first alleged injury, commercial speech as to sales and tobacco taxes cannot be a direct cause of

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[27] This second "source" of injury transforms Respondent's claimed RICO predicate act to one based on the Jenkins Act, which is not a criminal statutory predicate act under RICO. *See City of New York*, 541 F.3d at 459 (Winter, J., dissenting).

a taxpayer's failure to honor possessory tax obligations. *Cf. United States v. Boyle*, 469 U.S. 241, 252 (1985)("The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing"). Moreover, the response itself confirms the indirect and speculative nature of the City's first alleged source of injury. Footnote 8 on page 8 of the response confirms that even "in instances when the City had received information that identified Internet cigarette purchases," it collected less than 55 cents on every dollar of taxes allegedly owed, receiving responses from only two-thirds of the City residents from whom it tried to collect. The law also contains payment exemptions.[28] As a result, it is improper to assume, as Respondent argues (at 40) and as opined by the Second Circuit Court of Appeals, that Respondent's damages are not speculative because they simply are "a specific dollar amount for each pack of cigarettes sold." That calculation ignores Respondent's admitted inability to collect all taxes, and the cost of tax collection. As Judge Winter noted:

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[28] Contrary to Respondent's claim, New York City's use tax exemption for possession of less than four hundred cigarettes does not contain an exclusion if the cigarettes were "shipped into the City by mail." Response at 49. Instead, the exemption applies to 400 cigarettes "on or in the possession of, any person." N.Y.C. Admin. Code § 11-1302(b)(1). Any other reading would mean a person could have an unlimited number of exempt cigarettes "on or in their possession" so long as they were only "brought into the city" 400 at a time. *People v. McKelvey*, 234 N.Y.L.J. 121 (N.Y. Crim. Ct. 2005)(dismissing misdemeanor charge because "anyone in possession of less than four hundred cigarettes has committed no crime under the offense charged here").

> A concern of taxing authorities everywhere is balancing the costs of collection against the recoverable revenue, a matter of great significance where the taxpayers are, as here, anything but inclined toward voluntary compliance. Moreover, the state appears uninterested in enforcing the Jenkins Act and may not collate or maintain accurate records of reports from out-of-state vendors or reliably pass them along. City customers, large numbers of individuals owing relatively small amounts in taxes, may be hard to trace, may assert various defenses in cases based solely on Jenkins Act reports, and may easily use non-City addresses. Finally, as to *Holmes* factor (iii), the City hardly has greater incentive to enforce the Jenkins Act through RICO than Anza-like competitors who lose sales because of their rivals' sales tax evasion.

City of New York, 541 F.3d at 461 (Winter, J., dissenting); *see Holmes*, 503 U.S. at 273 ("the district court would first need to determine the extent to which their inability to collect . . . was the result of the alleged conspiracy . . . as opposed to, say, . . . poor business practices").

Respondent also confirms the exposure in this case to the type of multiple, duplicative recoveries condemned by this Court. Again in its footnote 8, Respondent concedes that "some" City residents wrote to indicate they were "misled" by the websites of other defendants (not petitioners). There would be nothing to prevent individual customers (even if not "misled" because reliance is not required) from themselves seeking to recover possessory tax payments, penalties

and interest from RICO defendants duplicative to those claimed by Respondent. Potential claims by competitors must also be added to the mix, all resulting in lawsuits, including class actions, threatening duplicative judgments as cautioned against by this Court in *Anza*. Moreover, the evidentiary nightmare identified in *Hawaii* would come to pass with individual tax debtors, competitors, state and local government all required to demonstrate their own damages, costs of collection or payment, collection or payment rates (here fifty five cents on the dollar), and that none of the sales were tax exempt. Defendants would be exposed to multiple recovery, perhaps trebled, if individual taxpayers, competitors and sovereigns succeeded.

These same defects infect Respondent's allegations of injury from its inability to get lists of resident customers from the State. In this respect, Respondent's claims rest not on mail and wire fraud, but on alleged violations of the Jenkins Act.[29] Moreover, this Court's decision in *Anza* is dispositive of this second alleged source of injury. There, this Court concluded that the plaintiff's injuries were not proximately caused by the defendants' actions because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Anza* at 458. That is exactly the same cause of harm asserted by Respondent here. Moreover, this alleged source of injury is even less proximate than the first,

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[29] "The only fraudulent acts alleged that sound in fraud, therefore, are the violations of the Jenkins Act." *City of New York*, 541 F.3d at 459 (Winter, J., dissenting). *See* footnote 4, *supra*.

because 1) even if the State had received those names, there is no certainty they would have been given to the City, and 2) even when the City has received names, it collected only pennies on the dollar as noted above. This is not a reliance issue, as Respondent incorrectly argues, but instead a proximate cause issue, which Respondent cannot avoid. Indeed, in holding RICO does not include a reliance element, this Court specifically underscored the continued vitality of the proximate cause requirement. *Bridge v. Phoenix Bond & Idem. Co.*, 128 S. Ct. 2131, 2142 (2008).

Finally, standing based on lost sovereign "opportunity" would result in exactly the harm cautioned against by Justice Breyer in his concurring opinion in *Anza*: "the source of the savings is, in my view, beside the point as long as the price cut itself is legitimate." 547 U.S. 487-88. *See also id.* at 486 ("I would read into the private treble-damages provision a 'proximate-cause' limitation that places outside the provision harms that are traceable to an unlawful act only through a form of legitimate competitive activity."). Hemi's "prices are lower because State and City taxes are not and will not be included in the price." Response at 49. But because Hemi did not owe or pay those taxes, they should not be included in the price. Respondent's tax collection from third parties does not impact Hemi's prices by a penny.

Instead, Justice Breyer's warning has come to pass. The fifty-two defendants listed on the Second Circuit's Opinion have won on every claim brought by Respondent save for the single issue before this Court. Yet today petitioner Kai Gachupin and his company stand alone in opposing Respondent. *Cf. Sedima v. Imrex Co.*, 473 U.S. 479, 520 (1985)(Marshall, J.,

dissenting)(RICO cases against legitimate businesses, "take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels"); and at 526 (Powell, J., dissenting)("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute").

D. The New York Court of Appeals has confirmed that New York City's alleged injuries are indirect.

The New York Court of Appeals, based on the exact record before this Court, held Respondent's state consumer law claim was entirely derivative and therefore bared. Unable to distinguish this unanimous holding, Respondent raises a hypothetical argument regarding the New York State Attorney General, and a reliance argument based on *Bridge*. Neither addresses the New York Court of Appeals' unanimous holding that Respondent's "claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet." *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y. 3d 616, 622 (2009). Specifically, the New York Attorney General does have standing to sue under the state law at issue, as does the United States Department of Justice under criminal RICO and the Jenkins Act. Tellingly, no such suits have been brought. As to Respondent's second argument, the New York Court of Appeals' decision was not based on lack of reliance: the court specifically used the words "entirely derivative." Respondent's proximate cause

argument to this Court is based on exactly the same alleged injuries held to be "entirely derivative" by the New York State Court of Appeals.

IV. Conclusion.

The holding of the Second Circuit Court of Appeals that the City of New York has standing to pursue its RICO claims should be reversed.

Respectfully Submitted,

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SUPPLEMENTAL BRIEF

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In The
Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF *AMICUS CURIAE* THE CAMPAIGN FOR TOBACCO-FREE KIDS

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RULE 29.6 STATEMENT

The corporate disclosure statement at page iv of the Petition for Writ of Certiorari remains accurate.

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INTRODUCTION

Petitioners Hemi Group, LLC and Kai Gachupin ("Petitioners") file this Supplemental Response Brief to the Brief of *Amicus Curiae* Campaign for Tobacco-Free Kids ("the Campaign") pursuant to Supreme Court Rule 25.5 (permitting a party up to the time the case is called for oral argument, or by leave of the Court thereafter, to "present . . . other intervening matter that was not available in time to be included in a brief").

The Campaign filed a motion for leave to file its *amicus curiae* brief on September 23, 2009. Petitioners filed their Brief in Opposition to the Campaign's motion on October 5, 2009, and their Reply Brief to Respondent's Response Brief on October 16, 2009. Four days later, on October 20, 2009, the Court granted the Campaign leave to file its *amicus* brief. At the time Petitioners filed their Reply Brief, the Court had not ruled on the Campaign's motion for leave to file its *amicus* brief.

The Campaign's *amicus* brief raises new issues regarding public health and Internet cigarette sales, as well as additional argument regarding the Contraband Cigarette Tax Act, 18 U.S.C. § 2341 *et seq*. Plaintiffs respond to this intervening matter as follows.

ARGUMENT

I. Health Impacts of Cigarette Smoking Do Not Justify Disregarding RICO's Civil Standing Requirements.

The *amicus curiae* brief of the Campaign for Tobacco-Free Kids raises only one legal argument – that by including violation of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* ("CCTA"), as a RICO predicate offense, Congress intended to confer standing upon state and local governments for civil RICO actions to recover tax losses sustained by violation of the CCTA. Yet half of the brief is dedicated to a discussion of the alleged harmful public health effects of Internet cigarette sales. Amicus implies that the problem is so severe that Congress must have intended to cast CCTA's net of liability as widely as possible, thus lending support to Amicus' argument for expanding RICO's civil standing requirements.

That implication is undermined, however, by Amicus' inability to point to any evidence in the CCTA or its legislative history that in passing the Act Congress was concerned about the health effects of smoking in general or their exacerbation by Internet sales in particular. To the contrary, Amicus acknowledges that both the CCTA and its legislative history demonstrate that Congress was solely concerned with the *revenue* effects created by the disparity of cigarette tax rates among the various States. *See* Amicus Brief at 12 – 17. Faced with that reality, Amicus embarks upon an unsuccessful effort to tie those revenue effects to the health impacts argued by Amicus.

Amicus relies upon twenty-seven academic papers to support the idea that cigarette "smuggling" and "tax avoidance" lead to critical health problems relevant to the issue before the Court. Yet, Amicus contradicts this argument in its own publications:

> In fact, research shows that smuggling and tax evasion not only fails to eliminate revenue gains from cigarette tax increases but is also a much smaller problem than the cigarette companies and their allies claim . . . .

Campaign for Tobacco Free Kids, Raising State Cigarette Taxes Always Increases State Revenues 2, *available at* http://tobaccofreekids.org/research/factsheets/pdf/0098.pdf (last visited Oct. 26, 2009). In that same publication, Amicus notes:

> After a cigarette tax increase, many smokers who initially try to avoid the higher rate soon use up their stockpile of cigarettes purchased right before the increase or tire of driving across state border or going to the Internet to buy cheaper cigarettes, and return to the convenience of normal full-tax purchases in their own state. Indeed, the vast majority of smokers prefer to buy cigarettes by the pack, but cross-border and Internet purchases involve multiple cartons. For example, New York state's taxable pack sales decreased sharply in the year after the state's 55-cent tax increase in March 2000, beyond what consumption declines might explain, but then increased in the following year – most likely because of smokers' depleted pre-increase stockpiles of cigarettes, smoker tax-evasion fatigue, and the strong appeal of

> convenient single-pack purchases from nearby sales outlets.

Id.[1]

Moreover, the material cited by Amicus is inconclusive, at best. For example, Amicus claims that "a recent study found that smokers who purchased tax-free cigarettes from the Internet significantly increased their consumption over time compared to smokers who reported paying full-price at traditional bricks-and-mortar retail stores."[2] Review of the cited study, however, confirms that Amicus overstates its results by implying that the study found that the consumption of all smokers increased as a result of purchasing online. Instead, the authors themselves note that the results of this study should be interpreted with caution, as they cannot be generalized to the population of New Jersey adult smokers (much less to the general online purchasers of cigarettes).

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[1] Amicus continues: "It is also worth noting that any real or imagined problems with smuggling and tax evasion after New York state's cigarette tax increase in 2000 were not significant enough to stop the state from increasing its cigarette tax to $1.50 per pack in 2002, and, more recently, to $2.75 per pack. Nor did it stop the state from permitting New York City to increase its supplementary local cigarette tax from 8 cents to $1.50 per pack in 2002. The levels of cigarette smuggling and tax evasion in New York City are supposedly among the highest in the country, but in the first year after its 2002 rate increase revenues increased nine-fold, to $250 million, significantly more than the city had expected." *Id.*

[2] Amicus Brief at 5, citing Annice E. Kim et al., *Smokers Beliefs and Attitudes about Purchasing Cigarettes on the Internet*, 121 PUB HEALTH REP 594-602 (Sept./Oct. 2006)

The authors also noted several other limitations, including that the researchers had a low response rate with regard to the follow-up survey. Further, the consumption analysis of the study was a post-hoc decision, not its primary focus. Finally, the study states that changes in consumption might be due to other factors besides smokers switching to purchasing online cigarettes. The authors of the study state that the results regarding consumption are "exploratory," and they note that factors that deter online cigarette purchases have not been studied, including the fact that smokers prefer immediate gratification and therefore most do not want to wait for cigarettes through the mail.[3]

Other material cited by Amicus demonstrates that the numbers of alleged youthful smokers claiming to obtain cigarettes from the Internet is not significant, with Amicus itself claiming only three percent of youthful smokers "had recently purchased cigarettes online." Amicus Brief at 10. Assuming that number was true in 2001 as claimed, it confirms that ninety-seven percent of youthful smokers did not get their cigarettes online. Notably, these are not percentages of all young people, but only of that limited number who smoke. Additionally, other studies call into question whether increased taxes have any significant impact on the number of youth who start smoking:

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[3] Other examples include Amicus' claims regarding age verification limitations on websites, citing Kurt M Ribisl et al., *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 92 AM J PUB. HEALTH 940-41 (June 2002) That article confirmed that its study was limited because the researchers noted that actual age verification methods would differ once orders were placed.

> [I]t is not so surprising that taxes and regulations are relatively ineffective prevention policies. Instead of using taxes or regulations to drive up the costs youth incur to smoke, it may be more effective to emphasize policies such as health education programs and media campaigns that shift youth cigarette demand.

Putting Out the Fires: Will Higher Taxes Reduce Youth Smoking? Philip DeCicca, Donald Kenkel, Alan Mathios; Department of Policy Analysis & Management Cornell University 26, *available at* http://www.hha.dk/nat/wper/00-3.pdf (last visited Oct. 26, 2009).[4]

This Court, although recognizing the health problems associated with cigarettes, has held those health concerns alone do not allow states to impose advertising restrictions pre-empted by federal law or prohibited by the First Amendment to the United States Constitution. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001)("The *First Amendment* also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information"). The Court also has held that public health concerns were insufficient to allow

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[4] *See also* News from the National Academies, May 24 2007, from *Ending the Tobacco Problem: A Blueprint for the Nation, Institute of Medicine* ("the rate of daily smoking among high school seniors has hovered around 20 percent for most of the past two decades") *available at* http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11795 (last visited Oct. 26, 2009).

restrictions on common carriers otherwise prohibited under federal law. *Rowe v. New Hampshire Motor Transp. Ass'n*, 522 U.S. 364 (2008)(state held without authority to require use of delivery companies that provide recipient age verification). Similarly, the Court held that the health impact of cigarettes alone is an insufficient basis upon which to extend legislation beyond its statutory terms or the intent of its drafters. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)(FDA held not to have authority to regulate cigarettes). Indeed, as one New York court has noted:

> Tax Law § 1814 (a) and (d), and the provisions of article 20 to which they refer, are what they purport to be, "Tax Laws," designed to raise revenue. There is nothing that suggests a legislative purpose or intent to protect "the safety or health of a considerable number of persons." One can hardly contend that the harmful effects of cigarette smoking are somehow ameliorated when the cigarettes have been taxed. Any suggestion that, by increasing the purchase price of cigarettes, the tax provides a disincentive to purchase and use them would be speculative, tenuous, and remote, and worthy of no more weight than a suggestion that the tax on fast food products shown to present health risks is a public health measure.

City of New York v. Land & Bldg. Known as 283 Ralph Ave., 848 N.Y.S.2d 835, 840 (N.Y. Sup.Ct. 2007).

This case is not about smoking or Internet cigarette sales, both of which are legal.[5] Instead, it is about RICO's requirement that a person be injured in the person's "business or property" to have standing to bring a civil action, and how that standing requirement is not met by a municipality's allegations of injury to its non-proprietary, sovereign interests.

II. The Inclusion of the CCTA as a RICO Predicate Offense Does Not Confer Standing Upon State and Local Governments For Civil RICO Actions to Recover Lost Opportunity to Tax.

The sole legal argument raised by Amicus is that by including violation of the CCTA as a RICO predicate offense, Congress intended to confer standing upon state and local governments for civil RICO actions to recover tax losses sustained from violation of the Act. Once again, however, Amicus can point to no evidence in the CCTA itself or in its legislative history that in passing the Act and including violation of it as a predicate act in RICO, Congress intended to affect civil RICO standing requirements. As a result, Amicus is left to argue only that "it is reasonable to conclude that by creating this civil cause of action, Congress intended to provide the states and their municipalities

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[5] Although laws have been passed restricting shipment and delivery of cigarette purchases, Petitioners are unaware of any law that prohibits the Internet sale of cigarettes. *See, e.g.*, NY CLS Pub Health § 1399-ll (which regulates shipment and delivery of cigarettes, not Internet sales); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003). For example, NY CLS Pub Health § 1399-ll does not restrict Internet sales made by companies in New York to customers located outside of that state

with an additional vehicle for combating cigarette bootlegging and recovering lost tax revenues." Amicus Brief at 18-19.

The argument is plausible only if one assumes that Congress could have had no other reason for including a violation of the CCTA as a predicate act in RICO *other than* to provide a civil remedy for states and municipalities to recover lost tax revenue.[6] To the contrary, however, Congress could, and in fact did, have a variety of other reasons, chief among them to provide "additional statutory basis for the Department of Justice to interdict organized cigarette racketeering." S. Rep. No. 95-1629 at 5 (1978). RICO is, after all, primarily a criminal statute, and by including a violation of the CCTA as a predicate offense, Congress made available to the Federal government a range of criminal penalties not available under the CCTA.[7] And, as Amicus notes, Congress also gave state and local governments direct criminal enforcement powers under the CCTA. Amicus Brief at

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[6] Ironically, the negative implication of that assumption is that Congress must have seen a need to do so because existing RICO predicate acts, including mail and wire fraud, do not provide states and municipalities with such a remedy. If that is the case, the remedy Respondent seeks is unavailable here, where the predicate acts alleged are not violation of the CCTA but of the mail and wire fraud statutes.

[7] Whereas CCTA violations are punishable by up to five years in prison and forfeiture of the contraband cigarettes (18 U.S.C. § 2344), RICO violators can be imprisoned for up to 20 years with forfeiture of all property derived from the activity and a fine of up to twice the gross profits or other proceeds from the offense (18 U.S.C. § 1963). Significantly, § 2344 does *not* impose payment of taxes due as a penalty.

19 n.27; *see* 18 U.S.C. § 2346(b)(1) and (2). In addition, including violation of the CCTA as a RICO predicate act provides Federal law enforcement with a way to reach traffickers under RICO who may not be amendable to prosecution under the CCTA.[8]

Thus, there are many other reasons why Congress might have included a violation of the CCTA as a RICO predicate act other than to provide governmental entities a Federal remedy for collection of lost tax revenue.[9] There is no indication, however, either in the CCTA itself or in its legislative history, that Congress intended to modify the civil RICO standing requirement that a plaintiff must be "injured in his business or property." 18 U.S.C. § 1964(c).

Stripped of its underlying assumption, Amicus' argument amounts to no more than the unfounded assertion that an injury suffered from a violation of the predicate act, such as a government's loss of tax revenues from a CCTA violation, necessarily constitutes an injury to the government's "business or

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[8] *See, e.g., U.S. v. Fiander*, 547 F.3d 1036 (9th Cir. 2008)(Native American defendant whose prosecution under the CCTA is barred by a treaty with his tribe may be prosecuted for conspiracy under RICO).

[9] Even with respect to civil RICO actions, Congress might well have had in mind enabling non-governmental "private attorney generals" to enforce the CCTA by way of a civil RICO action. For an example of the use of civil RICO based on a CCTA violation in a commercial context, *see, e.g., R.J. Reynolds Tobacco Co. v. Market Basket Food Stores, Inc., et al.*, No. 5:05CV-253-V, 2006 U.S. Dist. LEXIS 61927 (W.D. N.C. Aug. 21, 2006). In any event, Congress did *not* choose to include tax evasion as a RICO predicate offense.

property."[10] That proposition ignores, however, the fact that in passing RICO, Congress included an *independent* standing requirement, wholly apart from the standing requirements of the predicate acts. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 283 (1992)(O'Conner, J., concurring)("Section 1961(1)'s list of racketeering offenses provides the RICO predicates for both criminal prosecutions and civil actions. . . . Although not everyone can qualify as an appropriate 'private attorney general,' the prerequisites to the role are articulated, not in the definition of the predicate act, but in the civil action provisions of § 1964(c) – a plaintiff must allege 'injury in his business or property' by reason of a RICO violation"); *see also, Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987)(the statute of limitations for civil RICO actions is the four-year limit of the Clayton Act, 15 U.S.C. § 15b, rather than the limit imposed by the underlying statute establishing the predicate act).

Hence, while the inclusion of a CCTA violation as a RICO predicate act might provide state and local governments a civil RICO remedy for lost tax revenues *if* the tax has been assessed and is a choate property interest,[11] it does *not* convert a sovereign opportunity

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[10] Amicus' argument that civil standing under § 1964(c) is a derivative of the predicate act is a variation upon Respondent's position that the meaning of "property" in that section is dependent upon the meaning of "property" in the statute defining the predicate offense. *See* Respondent's Brief at 16, 21-22, construing *Pasquantino v United States*, 544 U.S. 349 (2005).

[11] *See* extended discussion in Petitioner's Reply Brief at 10-18.

to tax into an interest in "business or property" for the purpose of civil RICO standing.

CONCLUSION

The holding of the Second Circuit Court of Appeals that the City of New York has standing to pursue its RICO claims should be reversed.

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AMICUS CURIAE BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
HEMI GROUP, LLC and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CAMPAIGN FOR TOBACCO-FREE KIDS AND ACCOMPANYING BRIEF IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CAMPAIGN FOR TOBACCO-FREE KIDS

The Campaign for Tobacco-Free Kids ("the Campaign") respectfully moves for leave to file the attached *amicus curiae* brief in this case. The consent of the Petitioners was requested, but has been withheld.

The Campaign is a non-profit organization dedicated to reducing tobacco use and its devastating consequences in the United States and around the world. The Campaign has an interest in the curbing of tax-evading Internet cigarette sales because such sales have been shown to increase overall tobacco use, leading directly to higher levels of tobacco-caused disease, disability and deaths, and increased government and private-sector smoking-caused expenditures. The availability of cigarettes for purchase over the Internet also makes it easier for minors to obtain cigarettes and increases the use of cigarettes by children under the age of 18. The Campaign supports efforts to prevent illegal Internet tobacco sales and to promote the enactment and enforcement of state laws imposing higher tobacco taxes, because such taxes reduce smoking and save lives.

In the instant case, Petitioners have argued that state and local governments do not have standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), because tax revenue lost as a direct consequence of tobacco bootlegging does not constitute an injury to "business

or property" in accord with the statute and relevant authority. *See* Petitioners' Br. at 9-27.

Respondents have noted that in enacting the Contraband Cigarette Trafficking Act ("CCTA") Congress made violations of that law a predicate offense under RICO, thereby creating a private right of action for those injured by cigarette trafficking in contravention of state and local tax laws. *See* Respondent's Br. at 16, 23. Respondents argue that this in turn serves as evidence that Congress intended that tax losses suffered by state and local governments as a result of cigarette trafficking would be treated as "injury to business or property" under RICO. *See id.*

The attached *amicus curiae* brief expands upon this argument and demonstrates that it is thoroughly supported by the legislative histories of the CCTA and RICO. In doing so, the attached *amicus curiae* brief provides the Court with useful material not already brought to its attention by the parties.

Amicus curiae The Campaign for Tobacco-Free Kids therefore respectfully requests that the Court grant its motion and accept the attached *amicus curiae* brief for filing in this case.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE* THE CAMPAIGN FOR TOBACCO-FREE KIDS[1]

The Campaign for Tobacco-Free Kids ("the Campaign") is a non-profit organization dedicated to reducing tobacco use and its devastating consequences in the United States and around the world. The Campaign strives to deter kids from smoking, help smokers quit and protect everyone from secondhand smoke. The Campaign supports efforts to prevent illegal Internet tobacco sales because they produce substantial public health harms and related costs. The Campaign does not accept government funding, but it supports the enactment and enforcement of state laws imposing higher tobacco taxes because such taxes reduce smoking and save lives.

The vast majority of Internet tobacco sales are done without proper payment of applicable taxes. For example, a 2002 U.S. General Accounting Office report found that more than three quarters of all Internet-selling websites explicitly indicated that they did not comply with the Federal Jenkins Act, which requires Internet sellers to register with each state and provide monthly reports of their sales into the state.[2]

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[1] In accordance with United States Supreme Court Rule 37(6), *amicus curiae* The Campaign for Tobacco-Free Kids states that no counsel for any party either authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

[2] U.S. GENERAL ACCOUNTING OFFICE, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE

see also Cigarette Bootlegging: A State and Federal Responsibility, Report of Advisory Commission on Intergovernmental Relations (May 1977) (hereinafter, "ACIR Report"), reprinted in *Racketeering in the Sale and Distribution of Cigarettes: Hearing on S. 1487 Before the S. Comm. on the Judiciary, Subcomm. on Crim. Laws and Procedure*, 95th Cong. 25 (1977).

At the same time, Congress repeatedly stressed its strong belief "that primary efforts to stop cigarette smuggling must rest with the States" and that the enactment of the CCTA should not cause states to relax their own enforcement efforts because of "the serious nature of the problem and the recognition of the vital role the States must play if the effort is to be successful." S. REP. at 9, 1978 U.S.C.C.A.N. at 5524; *see also* H.R. CONF. REP. NO. 95-1778, at 7 (1978) (hereinafter, "H.R. CONF. REP."), as reprinted in 1978 U.S.C.C.A.N. 5518, 5536. ("[A] Federal role in the fight against cigarette smuggling . . . will be undertaken with the recognition that primary enforcement responsibility remains with the individual States.").

Although noting that some states, like New York, already had launched major programs aimed

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crimes and political corruption as additional adverse consequences of cigarette bootlegging. *Id.* In 2006, Congress amended the CCTA in part to address the then-emerging use of cigarette bootlegging as a means for funding terrorist activities. H.R. REP. NO. 3199 at H6282, H6284 (2006); PUB. L. NO. 109-177 § 121 (2006), 2006 U.S.C.C.A.N. (120 STAT. 221, 223).

at stanching the flow of taxpayer dollars into the pockets of bootleggers, Congress acknowledged that, as a whole, states lacked the tools necessary to address the problem on their own. *See* H.R. CONF. REP. at 7, 1978 U.S.C.C.A.N. at 5536. ("[T]he conferees acknowledge . . . . that the States are not adequately able to stop the movement into their States and the sale of cigarettes in violation of their tax laws through the exercise of police power . . . ."); S. REP. at 11, 1978 U.S.C.C.A.N. at 5526 ("[W]e recognize that federal legislation in aid of state enforcement efforts may be desirable, if not essential, in light of the interstate nature of the problem."); COMM. PRINT at 3 ("[T]he interstate nature of the problem hampers State and local law enforcement efforts."); *id.* at 14 ("[G]iven the limited resources they have to work with and the difficult nature of the problem, it is questionable whether [state tax and law enforcement authorities] can be much more effective without greater support from all branches of State government and additional federal assistance.") (quoting ACIR Report).

To address the problem of cigarette bootlegging, Congress acted to enhance the federal government's ability to address cigarette bootlegging and aid state efforts to enforce state tax laws. By enacting the CCTA, Congress made it a federal crime "to knowingly ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18

U.S.C. § 2342(a).[26] At the same time, Congress amended the Racketeer Influenced and Corrupt Organization Act ("RICO") to include this new offense as a specifically enumerated offense under 18 U.S.C. § 1961(1)(B). *See* Contraband Cigarette Trafficking Act, PUB. L. NO. 95-575, § 3(c), 92 STAT. 2465-66 (1978).

By designating a violation of the CCTA as a RICO predicate offense, Congress transformed the CCTA from a purely criminal statute into a statute that also could serve as the basis for civil liability under RICO. As a RICO predicate, an act of bootlegging in violation of the CCTA gives rise to a civil cause of action by which "any individual or entity capable of holding a legal or beneficial interest in property" could recover for any injury to "their business or property" caused by that act of bootlegging. 18 U.S.C. §§ 1961(3), 1964(c).

Given the legislative history set forth above – including the clearly-stated intention of Congress to aid state and local governments in addressing a problem it saw as primarily a state responsibility – it

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[26] Congress initially defined "contraband cigarettes" to include only cigarettes sold without bearing required evidence showing the payment of state cigarette taxes, such as tax stamps. *See* PUB. L. NO. 95-575, 92 STAT. 2463. Congress subsequently amended the definition of "contraband cigarettes" specifically to include cigarettes sold without bearing required evidence of the payment of local taxes as well. *See* 120 STAT. 222; 109 CONG. REC. H6283 (daily ed. July 21, 2005) (amending 18 U.S.C. § 2341(2)).

is reasonable to conclude that by creating this civil cause of action, Congress intended to provide the states and their municipalities with an additional vehicle for combating cigarette bootlegging and recovering lost tax revenues.[27] Indeed, it is hard to imagine any other persons or entities who could be expected to suffer injuries directly inflicted by violations of the CCTA that would come close to approaching the magnitude of the injuries suffered by state and local governments.[28]

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[27] Congress took additional steps in aid of state and local enforcement when it amended the CCTA to give state and local governments direct enforcement powers under the statute. Those powers include the right to bring actions in United States district courts to prevent and restrain violations of the CCTA and to obtain appropriate relief, including money damages. *See* 18 U.S.C. §§ 2346(1)-(2). In doing so, Congress specifically emphasized that it did not intend to restrict the right of local government officials to seek remedies or take enforcement actions under other federal laws. *See* 18 U.S.C. §§ 2346(3)-(5).

[28] Indeed, the other persons and entities that Congress identified as being harmed as a result of cigarette bootlegging – cigarette wholesalers and retailers who suffer lost sales due to the lower cost of bootlegged cigarettes, and taxpayers who must pay higher taxes or receive fewer services as a result of lost tax revenues – suffer injuries that clearly are too attenuated and indirect to be redressed by RICO. For example, this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), specifically held that business losses allegedly caused by competitors who used the proceeds from tax fraud to lower prices and attract customers failed to satisfy RICO's proximate cause requirement. Taxpayer injuries are similarly attenuated, being entirely derivative of the direct tax losses suffered by the state and local governments who serve them. *See, e.g., Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985) (Easterbrook, J.) (holding that taxpayers lacked standing under RICO because

In acting to provide state and local governments with a civil cause of action under RICO for recovery of losses suffered as a result of cigarette bootlegging under the CCTA, all of which necessarily come in the form of lost tax revenues, Congress must have considered such losses to constitute injuries to the "business or property" of state and local governments under RICO.

Thus, the legislative histories of the CCTA and RICO support the position of Respondent, the City of New York, and counsel in favor of affirming the order below.

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their injuries due to fraudulently reduced property tax assessments were merely derivative of injuries to county, but that county had RICO standing as the "directly injured party" whose lost tax revenues constituted injury to "business or property.").

CONCLUSION

For all the aforementioned reasons, the order below should be affirmed.

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No. 08-969

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CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, FLORIDA, HAWAII, IDAHO, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEBRASKA, NEW JERSEY, NEW MEXICO, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act requirement that a plaintiff be injured in its "business or property" by alleging injury resulting from non-payment of taxes.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Florida, Hawaii, Idaho, Illinois, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, South Carolina, Utah, West Virginia, and Wyoming are interested in civil liability under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as 18 U.S.C. §§ 1961-1968 (2006)), because they and their subdivisions have been or may be parties in a variety of civil RICO actions seeking to redress monetary and other injuries to government entities. Corrupt public officials and their cronies sometimes loot state and local government agencies through racketeering activity. The federal civil RICO statute provides an important, albeit limited, tool to seek redress for losses associated with such corruption. State and local governments, through the actions of responsible government officials, resort to RICO only infrequently when all other options have been exhausted.

For example, the State of Indiana, both on its own behalf and as relator for the City of East Chicago, has recently used the federal RICO statute to sue former East Chicago Mayor Robert Pastrick and his associates for losses they inflicted on city government by running the city as a corrupt enterprise. A limited example of this was the illegal "sidewalks-for-votes" scheme where Pastrick and others converted millions of dollars of city funds to pay for new sidewalks and driveways and tree

trimming for their political supporters prior to the 1999 mayoral primary. Investigations of the rampant corruption led to successful federal prosecutions of various actors,[1] but not of Pastrick or his closest allies, James Fife and Timothy Raykovich. Indiana's RICO lawsuit against those three and many other individuals and companies not only brought in settlements (including with Raykovich) totaling $1,438,025, but also led, on the eve of trial, to default judgments against Pastrick and Fife. *Indiana v. Pastrick*, No. 04-CV-506 (N.D. Ind. June 1, 2009) (Docket No. 559, 561). The case remains pending for the district court to determine remedies. Under RICO's treble damages provision, Indiana has requested judgment against Pastrick and Fife for all their wrongdoing in the amount of $108,998,876.30.

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[1] Edwardo Maldonado, City Controller, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2; Randall Artis, Third District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A),(B) and 18 U.S.C. § 2; Frank Kollintzas, Fourth District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A), 18 U.S.C. § 2 and 18 U.S.C. § 1001; Adrian Santos, Fifth District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2, 18 U.S.C. § 1343 and 18 U.S.C. § 2, and 18 U.S.C. § 371; Joe De La Cruz, At-Large Councilman, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2; Jose Valdez, Jr., General Foreman, East Chicago Parks Department, convicted of 18 U.S.C. § 1343, 18 U.S.C. § 371, 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2, Pedro Porras, City Engineer, convicted of 18 U.S.C. § 1343, 18 U.S.C. § 371, 18 U.S.C. § 1503 and 18 U.S.C. § 1623.

Regardless of how much Indiana ultimately collects on behalf of the government and citizens of East Chicago, without civil RICO available as a federal court cause of action, Pastrick and Fife may never have faced justice of any sort. And critical to Indiana's use of the federal RICO statute was the principle that all government money constitutes "property," the loss of which can constitute injury under the RICO statute. If "property" under RICO is limited to commercial injuries, Indiana's judgments against Pastrick and Fife would be vulnerable to attack, and states and localities would lose a useful tool in the fight against corruption.

When corrupt actors—wayward government officials and tax evaders alike—abscond with government property, responsible officials should be able to turn to the federal RICO laws for relief, both as a matter of seeking full recovery and of deterring future would-be wrongdoers.

SUMMARY OF THE ARGUMENT

Petitioner's business model, which it shamelessly defends, requires it to ignore federal and state tax reporting laws and thereby defraud the City of New York of tax revenues. While Hemi writes as if its tax-dodge-scheme earns itself no particular benefit, Pet. Br. at 21, surely Hemi would not bother to break the law otherwise. In truth, failing to report to New York officials cigarette sales to New York consumers has the effect of shifting what ought to be tax payments from those consumers to the pockets of

Petitioners, whose cigarettes will, sans any realistic possibility of tax consequences, cost consumers marginally less than those of law-abiding manufacturers. So, by illegally defrauding the City of taxes owed to it, Hemi can increase its earnings. This business model is not a triumph of free-market ingenuity as suggested by the Petitioners, Pet. Br. at 36, but is instead nothing more than free-rider trickery that the Court should not validate.

That said, the interest of the amici states is not the specific issue of whether tax revenue is "property" under RICO. Instead, the amici states focus this brief on the reasons why RICO should not be read to require a "commercial" injury.

By explicit Congressional directive, courts must read and apply the RICO statute broadly. There is simply no requirement for a "commercial" injury in the text of the statute. Further, the argument that the meaning of RICO's "business or property" language is identical to the meaning of the same text in the Clayton Act ignores the substantially different contexts of the statutes. The Clayton Act is aimed relatively narrowly at monopolistic businesses, while RICO is intended to combat general corruption and is not narrowly targeted at "traditional" organized crime such as La Cosa Nostra. What is more, the Court's interpretations of the Clayton Act requiring losses to occur in a business's mercantile activities arose *after* Congress passed RICO, so while Congress modeled RICO on the Clayton Act in some ways, it is

not reasonable to infer that Congress intended such a narrow application of RICO's civil remedies.

Nor is there any danger that a holding in favor of New York will open the floodgates and overwhelm federal courts with civil RICO cases. In nearly every civil RICO case that comes before the Court, the defendant makes this argument, but the Court has nonetheless read the statute broadly and ruled for the RICO plaintiff in each of those cases. At the same time, over the past 20 years, the number of RICO cases in federal courts has steadily declined. Even as broad as it is and is intended to be, RICO remains a challenging statute to enforce, not because "business or property" injury is difficult to prove, but principally because establishing an "enterprise" or a "pattern of racketeering activity" often requires proof of intricate personal relationships that do not exist or that may not be revealed through discovery. In any event, even if the fear of open floodgates were legitimate, it is a policy concern more appropriately addressed to Congress.

Ultimately, even if the Court is persuaded that unpaid tax revenues do not constitute "business or property" losses under RICO, its holding should not venture as far as Petitioner urges—to the point of excluding *all* non-commercial losses from civil RICO recovery. Rather, the Court should reserve for another day the issue whether non-commercial losses to state bank accounts, such as through misappropriation, conversion and embezzlement, constitute recoverable RICO injuries.

ARGUMENT

I. The RICO Statutory Text Does Not Include a "Commercial" Injury Requirement

Proper application of RICO, or any other statute, begins with understanding the "language of the statute" which is "the most reliable evidence of its intent[.]" *United States v. Turkette*, 452 U.S. 576, 593 (1981). The importance of reading the statute cannot be overstated. *See* Henry Friendly, *Benchmarks* 202 (1967) (quoting the three rules of Justice Frankfurter for interpreting statutes, "(1) read the statute, (2) read the statute, (3) read the statute"); *see also Felix Frankfurter, Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration."). Roscoe Pound noted the danger of interpreting statutes based on judges' policy preferences, stating that "specious construction tends to bring law in to disrespect; . . . subjects courts to political pressures; invites an arbitrary personal element in judicial administration; [it threatens to make] laws. . . worth little [and to] break down [the] legal order." Roscoe Pound, *III Jurisprudence*, 488-90 (1959). Justice Cardozo also put it well: "[A court's] duty is done when [it] enforce[s] the law as it is written." *Techt v. Hughes*, 128 N.E. 185, 186 (N.Y. 1920).

With those underlying principles as a starting point, applying the relevant operational text of civil RICO in this case is an unremarkable task. RICO authorizes persons to sue for appropriate redress, including equity relief, treble damages and attorney's fees, when they are "injured" in their "business or property" "by reason of" a RICO "violation" that includes, *inter alia,* the elements of "enterprise" and "pattern of racketeering." 18 U.S.C. § 1964(a), (c). There is no magic to understanding the key text in this petition—"business or property" means just what it says, and nothing more or less.

A. Governments are injured in their "business" and when their bank accounts are improperly depleted

By any ordinary understanding, a party's fraudulent conduct that ultimately deprives a state or local government of money injures the government in its "business or property." 18 U.S.C. § 1964. "Business" means "occupation," "work," "concern," or "activity," *Oxford English Dictionary* at 110 (Paperback ed. 2001), or even "enterprise," "transactions," or "matters," *Oxford English Dictionary* 211 (8th ed. 2004). Thus, a governmental entity engages in "business" when it performs its ordinary work, such as collecting taxes and providing services to its residents. Corrupt actors harm a government's "business" when their activities funnel money away from government services and activities.

B. The concept of "property" is broad enough to include money and the intangible right to uncollected debts

The meaning of "property" in this context is no more elusive than "business." "Property" means "belonging" or "right." *Oxford English Dictionary* at 669 (Paperback ed. 2001) ("belonging"); *Oxford English Dictionary* 1252 (8th ed. 2004) ("right" "ownership," or "bundle of rights"). Fittingly, the Court has observed that "'[p]roperty' denotes a broad range of interests." *Russello v. United States*, 464 U.S. 16, 21 (1983) (construing RICO and quoting *Perry v. Sinderman*, 408 U.S. 593, 601 (1972)). And there can be no question that "[m]oney . . . is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (construing the Clayton Act); *see also Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998) (holding that interest on client funds kept in lawyers' accounts is client property under the Takings Clause). That should end any debate over whether the word "property" inherently suggests only that which is derived from some commercial activity.

Petitioner, however, argues that "property" in the civil RICO context is limited to traditional 19th century notions of property, which (they say) did not include such things as unpaid taxes or, more broadly, an intangible right to collect unpaid debts. Pet. Br. at 22. First, however, there is no basis—even under 19th century law—for driving a wedge

between money as property (a concept indisputably recognized in the 19th century) and the right to collect money as property. In fact, "a 'chose in action'—an interest in property not immediately reducible to possession (which, over time, came to include a financial interest such as a debt, a legal claim for money, or a contractual right)"—was recognized as assignable property by the Court in 1816. *Sprint Commc'ns Co., L.P. v. APCC Services, Inc.*, -- U.S. --, 128 S.Ct. 2531, 2536, 2538 (2008) (citing *Welch v. Mandeville*, 14 U.S. 233, 236 (1816)).

Second, concepts of "property" changed dramatically during the 20th century. *See generally Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972) ("the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."). By 1970 it was well-established that property rights extended well beyond traditional Hohfeldian bundles and could even be found in expectations of government employment, government benefits, unemployment compensation, and tax exemptions. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (withdrawal of public assistance benefits); *Sherbert v. Verner*, 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of a tax exemption); *Slochower v. Bd. of Higher Educ. of New York*, 350 U.S. 551 (1956) (discharge from public employment); *see also United States v. Ivezai*, 568 F.3d 88 (2d Cir. 2009) (construing RICO).

Accordingly, a much broader idea of property prevailed by the time Congress considered and passed RICO, which is the date as of which it must be construed. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that "unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning") (emphasis added). Several RICO cases have recognized predicate property interests that likely would not have been found to exist in the 19th century. *See, e.g., Brown v. Cassens Transp. Co.*, 546 F.3d 347 (6th Cir. 2008) (concluding that mail and wire fraud relating to a scheme to deny workers' compensation benefits is a proper predicate offense under RICO); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002) (holding that parties who show "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes" have shown a property interest sufficient to provide standing under RICO).

Petitioners offer no reason for inferring that Congress intended to invoke outworn 19th century notions of property when it enacted RICO. What is more, even if Congress did so intend, traditional property rights did not refer exclusively to rights gleaned from commercial activity. Indeed, in the 19th century property included not only money derived from any source but also the right to collect unpaid debts that were owed for any reason.

C. Statutory text commands that RICO be construed broadly

If the statutory text "business or property" is not clear enough, Congress provided an interpretive guide specifically for RICO. Congress was well aware that, with RICO, it was enacting a broad statute with broad remedies. Rather than risk judicial uncertainty about whether Congress really intended that breadth, Congress made the critical decision to mandate liberal construction of the statute, inserting text directing that "[t]he provision of [RICO] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, 84 Stat. 922, 947 (1970).

RICO is not ambiguous and clearly does not require "commercial" injury. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (RICO "demonstrate[s not] ambiguity[, but] breadth") (citation omitted); *see also Boyle v. United States*, -- U.S. --, 129 S.Ct. 2237, 2246-47 (2009) (text of the RICO statute is "clear but expansive"). If doubt exists, however, the proper course is to resolve any ambiguity in RICO according to its construction clause. Requiring a showing of a "commercial" injury would hardly give RICO a liberal construction.

II. The History and Underlying Policy of the Civil RICO Statute Demonstrate that Courts Should Use it to Afford Broad Relief Unencumbered by Limits on Antitrust Actions

Petitioners' central thesis is that, because the civil RICO statute was patterned after the antitrust laws, it comes bound with the same limits to the meaning of "business or property" that have hemmed the Clayton and Sherman Acts. Examining another statute to determine meaning, however, is traditionally improper absent an initial showing of ambiguity of the statute before the court. *Hamilton v. Rathbone,* 175 U.S. 414, 421 (1899) (finding "that prior acts may be resorted to, to solve, but not to create an ambiguity."). Because Petitioners have not shown ambiguity, their discussion of the antitrust acts is irrelevant.

Indeed, the Petitioners acknowledge that superficial textual similarity to the antitrust laws gets you only so far in understanding civil RICO. Pet. Br. at 28. The history of the statute and the policy objectives giving rise to it are crucial for a proper appreciation of the Act's breadth. This Court and others have long recognized as much and applied the Act broadly. Meanwhile, Congress, despite many opportunities to do so, has declined to narrow, in response to the Court's decisions, the circumstances under which the Act affords relief. Accordingly, there is no reason to change course and

apply a non-textual restrictive understanding of "business or property."

A. RICO's history points in the direction of a broader meaning of "business or property" than prevails in antitrust

1. Congress enacted RICO to deal with "enterprise criminality," which consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (citations omitted). Initial versions of the statute proposed in 1967 would have used antitrust theories as a way to combat organized crime by inserting new language into the Sherman Act. *See Sedima,* 473 U.S. at 498-99. The ABA studied the proposed statutes and suggested that a statute separate from the antitrust laws should be created so that private litigants would not "have to contend with a body of precedent—appropriate in a purely antitrust context[.]" *Id.* at 498; *see also* 115 Cong. Rec. 6995 (1969) (ABA Report).

As the ABA urged, Congress enacted a separate statute. Therefore, any suggestion that RICO actions be limited by antitrust-type limitations—including "commercial" injuries—should be rejected. RICO was created as a separate statute precisely so that narrowing considerations would not limit its scope.

Although the occasion for drafting the statute was to facilitate the prosecution of organized crime, "Congress for cogent reasons chose to enact a more general statute" and "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989). Indeed, included within RICO's operative notion of "racketeering activity" are (1) violence, such as organized crime hits, hate crimes, and terrorism; (2) the provision of illegal goods, services, and people, such as drugs, prostitution, and illegal aliens; (3) corruption in unions and government entities, federal and state, such as fraud, bribery, and extortion; and (4) commercial and other frauds characteristic of white-collar offenders.[2] "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima*, 473 U.S. at 499 (citation omitted).

2. Furthermore, the "commercial injury" gloss that Petitioner seeks to add did not exist when RICO was enacted. Rather, it comes from the language of

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[2] *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237, 300-06 (1982).

an antitrust case, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972), decided two years *later*.[3]

While it is generally true that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute[,]" *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), that does not mean that the latter statute carries the post-enactment interpretive baggage of the former. An interpretation of the first statute that takes place after the second statute is drafted cannot possibly reflect the intent of the legislature that drafted the second statute. *See Stutsman County v. Wallace*, 142 U.S. 293, 312 (1892). And, when looking to antitrust laws for guidance concerning RICO, the Court has been careful to note that the relevant interpretation arose before Congress enacted RICO. *See Rotella v. Wood*, 528 U.S. 549, 557 (2000) (relying on Clayton Act precedent because "the Clayton Act's injury-focused accrual rule was well established by the time civil RICO was enacted[,]" thus, suggesting that the

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[3] Petitioners' argument that the Court must assume that Congress was aware of, and intended to engraft onto RICO, an obscure Ninth Circuit opinion released a month before RICO was passed, but three years after Congress began debating RICO, smacks of playing "gotcha" with Congressional intent rather than a serious effort to discern Congress's original understanding of RICO. *See* Pet. Br. at 11.

timing is important); *see also Lorillard*, 434 U.S. at 580 (finding it relevant that the underlying statute had been interpreted "long before Congress enacted" the new statute).

Furthermore, the Court has marginalized the importance of its decision in *Hawaii* even as far as it goes. In *Reiter*, the Court explained that even though in *Hawaii* it had "noted that the words 'business or property' refer to 'commercial interests or enterprises,'" that language of the opinion was not meant to "suggest[] that *only* injuries to a business entity are within the ambit of [the antitrust statutes.]" *Reiter*, 442 U.S. at 341 (emphasis added). Particularly since the ambit of "business or property" in antitrust may not be limited to mercantile interests, it would be reckless to limit those terms in a statute such as RICO that is intended to reach harms well beyond the narrow focus of the antitrust laws.

3. In the end, unlike antitrust laws, RICO exists, in part, as a tool to fight corruption in government entities. *See* Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Non-commercial losses to government accounts, through misappropriation, conversion, embezzlement, kickbacks, and other means, constitute the types of injuries that Congress generally tried to reach through RICO. *Id.*

Criminal RICO cases make this clear. For example, in *United States v. Emond*, 935 F.2d 1511,

1512 (7th Cir. 1991), the village manager of Streamwood, Illinois used his official position "to extort money from persons with business before the village government, and engaged in a separate scheme to defraud the government of the local county." He and his wife failed to report their ill-gotten gains on their tax returns and were subsequently convicted of tax evasion. *Id.* Edward Emond was also convicted of RICO violations, mail fraud and extortion. *Id.* at 1513. When governments are defrauded, RICO is a useful tool.

Meanwhile, "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." *Reiter*, 442 U.S. at 342. It therefore makes sense to limit the range of compensable injuries to mercantile harms (if in fact that is what the Clayton Act does).

Thus, "although RICO borrowed the tools of antitrust law . . . . the objectives of RICO and the antitrust laws [are not] coterminous[:]" RICO "was [not] limited to the antitrust goal of preventing interference with free trade." *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1983). For that reason, "[t]he same words, *in different settings*, may not mean the same thing." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950) (emphasis added).

Congress used words in RICO that were very general and adaptable. In fact, RICO fits well into the traditional pattern of federal legislation aimed at a particular problem, but drafted in all-purpose

language. The Ku Klux Klan Act of 1871 (18 U.S.C. §§ 241-42 (criminal sanctions) and 42 U.S.C. § 1981 *et seq.* (civil sanctions)) is a classic example. Congress aimed the 1871 Act at the Klan in the South after the Civil War. *See Virginia v. Black*, 538 U.S. 343, 353-58 (2003). But its criminal and civil sanctions apply to "any person" who deprives another of rights guaranteed under the Constitution or other federal law. Thus, it applies today to the unlawful conduct of police officers in all regions of the country, as the infamous Rodney King incident in Los Angeles well illustrates. *See Koon v. United States*, 518 U.S. 81, 85-88 (1996) (reviewing the prosecution of the Los Angeles police officers under 18 U.S.C. § 242 for beating Rodney King); *see also* Charlie LeDuff, *12 Years After the Riots, Rodney King Gets Along,* N.Y. Times, Sept. 19, 2004, at 18 (King subsequently obtained a $3.8 million settlement of his civil rights claim under 42 U.S.C. § 1983).[4]

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[4] For other examples of statutes that were drafted using all-purpose language and have been interpreted by courts to effectuate such language *see Garcia v. United States*, 469 U.S. 70, 72-80 (1984) (law prohibiting assault on a custodian of U.S. property, 18 U.S.C. § 2114, is not limited to postal carriers); *Bell v. United States*, 462 U.S. 356, 358-62 (1983) (law regarding bank robbery, 18 U.S.C. § 2113(b), is not limited to gangsters); *Perrin v. United States*, 444 U.S. 37, 46 (1979) (the Travel Act, 18 U.S.C. § 1952, is not limited to organized crime bribery); *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) (extortion under 18 U.S.C. § 1951 is not limited to racketeering); *United States v. Fabrizio*, 385 U.S. 263,

In light of this general language and the broad range of wrongs that RICO addresses, limiting damages to market injuries does not make sense the way it does in the antitrust context, where the actionable wrongs relate only to market manipulation. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950). Because of the very different policies that underlie RICO and antitrust law, there are "few countervailing reasons to lessen the impact of RICO remedies by importing the limitations" of antitrust law. *Bennett*, 685 F.2d at 1059 (rejecting antitrust competitive injury limitation in RICO context). In fact, because RICO's predicate offenses criminally protect a broad meaning of "property," it makes little sense for RICO to civilly protect only a narrow subset of the concept of property. *See* Jacob Poorman, *Exercising the Passive Virtues in Interpreting Civil RICO "Business or Property,"* 75 U. Chi. L. Rev. 1773, 1797 (2008) ("[N]othing in the Act's purposes, functions, or language indicate that civil RICO 'business or property' must have some special significance beyond what those two terms might have meant in the predicate act statutes.").

265-67 (1966) (law regulating lottery tickets, 18 U.S.C. § 1953, is not limited to organized crime); *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917) (law prohibiting white slave traffic, 18 U.S.C. §§ 2421-2424, is not limited to commercial prostitution).

B. The Court has long interpreted RICO expansively, in accord with Congress's expressly stated intent

RICO's construction clause requires a "liberal" interpretation of the statute. This Court and lower federal courts have taken heed of this congressional directive, generally adhering to the notion that "RICO is to be read broadly," *Sedima*, 473 U.S. at 497-98, so that it may combat not only organized crime, but also as many other corrupt enterprises as possible. *See also Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (even if the court's "approach would confer standing on any plaintiff RICO-suave enough to allege lost employment, . . . these policy consequences, assuming they are undesirable, cannot blind us to the statutory language. . . . The statute is broad, but that is the statute we have.").

This Court has explicitly stated that maxims of statutory construction are "not to be used in complete disregard of the purpose of the legislature[,]" and are only useful when the statute's meaning is unclear. *United States v. Culbert*, 435 U.S. 371, 379 (1978) (internal quotation omitted). In contrast, as in the case of RICO, when "Congress has conveyed its purpose clearly, [the Court will] decline to manufacture ambiguity where none exists." *Id.* (refusing to add "racketeering" to the unadorned text of the Hobbs Act, the current version of the "Anti-Racketeering Act of 1934").

The Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond & Indem. Co.*, -- U.S. --, 128 S.Ct. 2131, 2145 (2008). In *Bridge*, the issue was whether RICO "require[s] first-party reliance for fraud-based claims." *Id.* None of the common-law rules and policy arguments proposed by the petitioner in that case "persuaded [the Court] to read a first-party reliance requirement into a statute that by its terms suggests none." *Id.* at 2139. Similarly, just last term, the Court rejected an argument that a RICO "enterprise" is limited to a "business-like entit[y,]" stating that "[w]e see no basis to impose such an extratextual requirement." *Boyle v. United States*, -- U.S. --, 129 S.Ct. 2237, 2243 (2009).

Nor is the Court's resistance to non-textual restrictions of RICO liability of particularly recent vintage. Cases going back more than a quarter century have done the same. *See Russello v. United States*, 464 U.S. 16, 22 (1983) (rejecting the notion that the "interest" subject to forfeiture under RICO is limited to an interest in an "enterprise" itself); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001) (rejecting argument that there be a more formal legal distinction between "person" and "enterprise" than incorporation); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 261 (1994) (rejecting demand for proof of defendant's economic motive); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 278-79 (1992) (O'Connor, J., concurring)

(rejecting the addition of a purchaser/seller standing requirement where the predicate crime is securities fraud); *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (rejecting argument that state courts have no jurisdiction to consider federal civil RICO claims); *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (rejecting the idea that "predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (rejecting requirement that civil RICO requires a previous criminal conviction on the predicate offenses). Petitioner offers no reason to deviate from this course.

III. Floodgates Arguments Are Both Specious and Misdirected

Petitioners suggest that allowing the City to bring this case will lead to an "inappropriate expansion of mail and wire fraud jurisprudence." Pet. Br. at 36 n.23. This is a variation on the "floodgates" argument, some version of which arises in nearly every RICO case that comes before the court. *See, e.g.*, Brief of Petitioners at 14, *Bridge v. Phoenix Bond & Indem. Co.*, -- U.S. --, 128 S.Ct. 2131 (2008) (No. 07-210); Brief for Respondents at 30, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (No. 00-549); Brief of Respondent Timothy Murphy at 21, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (No. 92-780); Petitioners Brief at 36, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (No. 90-727); Brief of

Respondent at 42, *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (No. 87-1252); Brief for Petitioners Crown Life Insurance Company at 12, *Agency Holding Corp., v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987) (Nos. 86-497, 86-531); Brief for Respondents at 7, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (No. 84-648).

Notwithstanding the steady drumbeat of floodgates arguments, the Court adopted liberal interpretations of the civil RICO statute in each of these cases, as Congress directed. RICO cases remain a minute percentage of federal dockets, but even if that were not true, the question whether there are too many RICO lawsuits is for Congress, not the Court.

1. Some lower courts have feared civil RICO proliferation and have sought to limit it by imposing the same "commercial" injury requirement that Petitioners urge here. *See e.g., Canyon County v. Syngenta Seeds*, 519 F.3d 969, 976 (9th Cir. 2008) (holding that a commercial limitation prevents state governments from suing because of "any RICO predicate act" that "provoked any sort of government response"); *Michigan Dep't of Treasury v. Fawaz*, 848 F.2d 194, *2 (6th Cir. 1988) (unpublished) (allowing taxes as property under civil RICO would make "district courts as collection agencies for unpaid taxes").

As it happens, however, the data simply does not support floodgates prognostications. In 2008, the

United States filed 68,582 criminal cases, 18 (0.00026) of which were criminal RICO. Meanwhile, plaintiffs filed 245,427 civil cases in federal court, only 640 (0.0026) of which were civil RICO. *See Federal Judicial Caseload Statistic* (March 31, 2008), Tables D-2, C-2, *available at* http://www.uscourts.gov/caseload2008/contents.html.

Furthermore, in the last 15 years, the number of civil RICO filings has *declined*. Between 1993 and 2008, the number of civil filings in federal district courts *increased* from 229,850 to 245,247, whereas the number of civil RICO cases filed *decreased* from 903 to 640. *See Judicial Business of the United States Courts 1997*, Table C-2A, *available at* http://www.uscourts.gov/judicial_business/contents.html; *Federal Judicial Caseload Statistic* (March 31, 2008), Table C-2, *available at* http://www.uscourts.gov/caseload2008/contents.html.

One of the reasons for this decline may be the increased difficulty in proving a "pattern of racketeering activity." In fact, after *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), lower courts treat "pattern" as a substantial—and legitimate—limiting factor on the use of RICO in ordinary or routine disputes, that is, "garden-variety" disputes, whether commercial fraud, the collection of taxes, or limited instances of State or local governmental corruption. District courts regularly grant dismissals for a failure to show a "pattern," and the circuits regularly affirm the decision on appeal. *See, e.g., Schultz v. R.I.*

Hospital Trust Nat'l Bank, 94 F.3d 721, 732 (1st Cir. 1996) (single episode not "pattern"); *Tabas v. Tabas*, 47 F.3d 1280, 1296-97 (3d Cir. 1995) (en banc) (requiring continuity (or threat) or regular way of doing business; other factors less significant); *Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (same); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 593-94 (11th Cir. 1992) (same); *Pyramid Secur., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116-20 (D.C. Cir. 1991) (same); *Am. Eagle Credit Corp. v. Gaskins*, 920 F.2d 352, 354-55 (6th Cir. 1990) (same); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-69 (7th Cir. 1990) (same); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 190-93 (5th Cir. 1990) (same); *Lane v. Peterson*, 899 F.2d 737, 744-45 (8th Cir. 1990) (same); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) (same); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989) (same).

"Pattern" (and the similarly esoteric concept of "enterprise") works as a gatekeeper, keeping civil RICO litigation well within Congressional intent that it be a remedy for major problems. Thus, litigation involving only, for example, a single commercial dispute, no longer troubles the district courts, and when such cases do appear, district courts quickly and legitimately dismiss them. Because this Court construed RICO's *substantive* provisions to reflect Congress' vision of an important, albeit limited, claim for relief, no need exists now to narrow RICO by narrowing its

remedial aspects, a limitation that will apply to the core RICO cases as well as the marginal RICO cases.

While civil RICO remains an important tool to combat corruption, litigants, including state and local governments that, as the record low filings show, circumscribe their filings by exacting standards of litigation discretion, are not abusing the statute by bringing large numbers of frivolous claims. Sophisticated litigators use RICO only in systemic patterns of unlawful conduct, and when others attempt to use RICO improperly—a tiny minority of the filings—such claims are quickly dismissed. As the Court increases the plausibility demands on plaintiffs for surviving motions to dismiss, *see, e.g., Ashcroft v. Iqbal*, -- U.S. --, 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the threat of unfounded RICO claims shrinks even further.

2. In any event a court may not properly use fear of "excessive" litigation to curtail congressional express claims for relief. Floodgates fears, even if valid, "are policy considerations more properly addressed to Congress than to this Court." *Reiter*, 442 U.S. at 344-45 ("We must take the statute as we find it. Congress created the treble damage remedy. . . precisely for the purpose of encouraging *private* . . . [litigation.] These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the . . . [law] and deterring violations.") (emphasis in original). As the Court has recognized, "[t]hat our citizens have access

to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

The Court has specifically stated that, even if refusing to narrow the statute "leads to the undue proliferation of RICO suits, the correction must lie with Congress." *Bridge*, -- U.S. --, 128 S. Ct. at 2145 (internal quotations omitted). Further, the Court stressed, "[w]hatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO [to include a reliance requirement] to reflect their—or our—views of good policy." *Id.* *See also H.J. Inc.*, 492 U.S. at 249 ("[R]ewriting it is a job for Congress, if it is so inclined, and not for this Court."); *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of [RICO.]").

If RICO needs to be reformed, the changes must come from Congress. Yet after ample time, and in full possession of the facts, Congress has not acted to limit in any general way RICO's broad civil enforcement provisions. When Congress *has* determined that RICO should be limited, it has acted narrowly, such as to preclude the application of RICO to securities fraud cases. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107 (1995) (amending 18 U.S.C. § 1964(c)).

Furthermore, Congress has acted to *expand* application of civil RICO, such as when it passed the Comprehensive Forfeiture Act of 1984 and thereby amended RICO to specify that property subject to forfeiture for racketeering activity includes all proceeds obtained directly or indirectly from racketeering activity and real and tangible and intangible personal property. *See* S.Rep. No. 225, 98th Cong., 2d Sess. 191-92, reprinted in 9A U.S. Code Cong. & Ad. News (Nov. 1984). Also, after the decision in *McNally v. United States*, 483 U.S. 350 (1987), Congress expressly defined mail fraud, the key predicate offense here and in many civil RICO actions, to include defrauding another of the intangible right of honest services. *See* 18 U.S.C. § 1346.[5]

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[5] The *Sedima* Court noted that the predicate offenses for RICO prosecution are very broad. *Sedima*, 473 U.S. at 500. The mail fraud statute is one example of this breadth. In the Court's concurrent review of the conviction of media mogul Conrad Black it may determine whether § 1346 was impermissibly applied to the conduct of a private individual who did not intend economic or other property harm to the private party to whom the honest services were owed. *See United States v. Black*, 530 F.3d 596, 599-601 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 2379 (2009) (No. 08-876). We take no position on the merits of that case, but even if the Court does so find, it would be a narrowing of *substance*, not an improper narrowing of the *remedy*.

Most importantly, however, Congress has not generally limited RICO—and has certainly not limited RICO to the role of redressing liabilities for marketplace injuries. *See, e.g.*, H.R. 5111, 101st Cong., 2nd Sess. (1990) (unsuccessfully proposing to eliminate RICO's private right of action). The Court should not assume the responsibility for doing so here.

IV. Civil RICO Is an Important Tool for Combating Public Corruption, and the Court Should Do Nothing Here to Jeopardize Uses in that Context

As recent events remind us, local and state official corruption continues to be an unfortunate characteristic of modern-day political culture. *See United States v. Blagojevich et al.*, 2009 WL 2601326, No. 08 CR 888 (N.D. Ill. Aug. 21, 2009); *United States v. Cammarano III et al.*, No. 09-8128 (D.N.J. July 23, 2009); *see also* United States Department of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2007*, Table-1 (2007) (documenting 360 convictions of corrupt state or local officials in 2007).

As Indiana has demonstrated with its case against former East Chicago Mayor Pastrick, civil RICO can be an important tool in the fight against public corruption. *Indiana v. Pastrick*, No. 04-CV-506 (N.D. Ind. June 1, 2009) (Docket No. 559, 561). No matter the outcome of this case, the Court should avoid undermining Indiana's and potential similar

efforts to use civil RICO to combat graft by public servants.

1. The details of the *Pastrick* case warrant a brief review. In an effort to win the 1999 East Chicago Democrat Party mayoral primary, Pastrick and his cronies illegally spent approximately $24 million of public money to pay contractors who poured concrete, trimmed trees, and provided other services for political supporters. The damages caused by Pastrick's and his associates' unlawful operation and management of the City as a racketeering enterprise, including ostensible salaries and similar payments made to Pastrick, Fife and Raykovich, was $32,187,242. This scheme nearly bankrupted the city and led to several federal prosecutions. Former mayor Pastrick, however, was not criminally prosecuted. Indiana brought a civil RICO suit against Pastrick and James Fife, one of his closest allies, and the two ultimately accepted default judgments.

Because these thefts and conversions of East Chicago's money injured the City's "business or property," the State (as relator for the City) has requested treble damages, plus pre-judgment interest, of $108,998,876.30. The City's injuries plainly are not mercantile in nature. East Chicago does not sell its sidewalk and tree-trimming services—at least not legally. Neither, however, are East Chicago's losses either speculative or inchoate, the way Petitioners have characterized (fairly or not) the unpaid taxes at issue here.

The point is that, even if the Court is not persuaded that unpaid tax revenues constitute "business or property" losses under RICO, it should refrain from imposing a broad rule that civil RICO standing requires *commercial* losses. Such an expansive holding would threaten public corruption cases, including *Indiana v. Pastrick*, and curbing efforts to fight racketeering in government would seem to run counter to Congress's entire motivation for enacting RICO.

2. Along the same lines, Petitioners argue not only that non-mercantile losses do not count as "business or property" under RICO, but also that cities are not "persons" who may sue to recover non-mercantile funds under RICO. This theory, too, threatens Indiana's efforts to use RICO to combat public corruption through civil lawsuits. When a city's money is used unlawfully for private ends, the city should be permitted to act (either on its own or through a relator such as the State) as a "person" and bring suit to redress the injury to its business or property.

Petitioners prove too much with their theory that government interests in protecting sovereign responsibilities are too remote and indirect for a civil RICO claim because all power derives from the people. While it is true that sovereignty derives from the people, it does not follow that civil claims by the government should be rejected simply because the interests of any given citizen are too indirect or

remote on their own. Governments have identities distinct from the people to whom they are accountable. *See, e.g., Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945) ("Georgia as a representative of the public . . . has an interest apart from that of particular individuals who may be affected.").

Whether government bank accounts are characterized as "sovereign interests," "property," "business" or something else, the fact remains that they belong to an entity capable of personhood under the law. *See generally* 42 U.S.C. § 9601(21) ("The term 'person' means an individual, . . . United States Government, State, municipality, commission, political subdivision of a State, or any interstate body"). And while governments are not "persons" for *all* circumstances, *see, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989), that does not mean they are not persons under *any* circumstances.

Besides, the American legal tradition does not generally treat municipalities such as New York City or the City of East Chicago as sovereigns. *See Lincoln County v. Luning*, 133 U.S. 529 (1890). Rather, they are a sub-species of corporations, indistinct in their "personhood" from other sub-species of corporations, such as publicly held companies, privately held companies, and non-profits. *See Will*, 491 U.S. at 70 n.9 ("public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties").

Again, regardless of how it comes out in this case, the Court should avoid circumscribing civil RICO claims so broadly that it precludes state and local governments from using it to redress corruption. Adopting Petitioners' anti-sovereign view of RICO personhood would surely do that.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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